SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 40.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT LUMBER COMPANY, APPELLANTS,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY AND FERNWOOD, COLUMBIA & GULF RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

INDEX.

	Original.	Print.
Record from United States District Court for the Southern District of Mississippi	1	1
Bill of complaint	1	1
Exhibit A to bill of complaint.—Bill of complaint before I. C. C. in case of Swift Lumber Co. v. F. & G. R. R. Co. et al	30	18
Exhibit A to bill of complaint before I. C. C.—Schedule of rates on lumber	41	25
Exhibit B–1 to bill of complaint.—Answer of M. & St. L. R. R. Co. before I. C. C	44	27
Exhibit B–2 to bill of complaint.—Answer of B. & S. R. R. Co. before I. C. C	45	27
Exhibit B–3 to bill of complaint.—Answer of Walker D. Hines before I. C. C	47	28
Exhibit B–4 to bill of complaint.—Answer of F. & G. R. R. Co. before I. C. C	48	29
Exhibit C to bill of complaint.—Minutes of hearing before I. C. C. in case of Swift Lumber Co. v. F. & G. R. R. Co. et al	60	36
Testimony of J. B. Kimball	66	37
Testimony of J. L. Sheppard	136	70
Testimony of George B. Auburtin	249	120
Testimony of J. B. Kimball (recalled)	255	122
Testimony of J. M. Fush	257	123
Testimony of T. J. Quigley	282	135

cord from United States District Court for the Southern District of Mississippi—Continued.

	Original.	Print.
Bill of complaint—Continued.		
Exhibit E to bill of complaint.—Report of J. Edgar Smith, examiner, to I. C. C.	289	137
Exhibit I to bill of complaint.—Report of the I. C. C., Eastman, C.	300	145
Dissenting report, Hall, C.	307	151
Dissenting report, Daniels, C.	308	152
Order of the I. C. C.	311	154
Exhibit No. 1 to Palmer's testimony.—I. C. C. tariffs Nos. 193, 159, 5577, 3996, 5259, and 230 [omitted in printing]	317	
Exhibit No. 2 to Kimball's testimony.—Table showing distribution of shipment of Swift Lumber Co. for six months ending June 30, 1919 [omitted in printing]	324	
Exhibit No. 4 to Kimball's testimony.—Railway map of Mississippi, etc. [omitted in printing]	325	
Exhibit No. 6 to Kimball's testimony.—List of sawmill points on various lines taking Group 1 rates [omitted in printing]	326	
Exhibit No. 8 to Kimball's testimony.—Lease, Fernwood Lumber Co. to Swift Lumber Co., March 14, 1912 [omitted in printing]	331	
Exhibit No. 1 to Sheppard's testimony.—Map showing various railroad lines [omitted in printing]	332	
Exhibit No. 2 to Sheppard's testimony.—Statement of rates on pine lumber carloads from important pine shipping points, etc. [omitted in printing]	333	
Exhibits Nos. 3 and 4 to Sheppard's testimony.—Extracts from I. C. C. reports in various cases [omitted in printing]	334	
Exhibit No. 5 to Sheppard's testimony.—Chart and legend showing short-line connections of I. C. R. R. et al. in Mississippi and Louisiana [omitted in printing]	339	
Exhibit No. 6 to Sheppard's testimony.—Statement of lumber shipments of Swift Lumber Co., January 1 to August 31, 1919 [omitted in printing]	341	
Exhibit No. 7 to Sheppard's testimony.—Statistical table [omitted in printing]	342	
Exhibit No. 8 to Sheppard's testimony.—Statistical table showing basis on rates for lumber C. L. to Ohio and Mississippi River crossings, etc. [omitted in printing]	343	
Exhibit No. 9 to Sheppard's testimony.—Comparison of rates to Fernwood and to Knoxo, Miss. [omitted in printing]	349	
Exhibit No. 10 to Sheppard's testimony.—Table showing routes for lumber from Mississippi Central R. R. stations [omitted in printing]	350	

ord from United States District Court for the Southern District
Mississippi—Continued.
Bill of complaint—Continued.
Exhibit I to bill of complaint—Continued.
Order of the I. C. C.—Continued. Original. Print.
Exhibit No. 11 to Sheppard's testimony.—Sketch showing comparison of rates, Knoxo, Miss., to Columbus, Ohio, etc. [omitted in printing]----- 352
Exhibit No. 12 to Sheppard's testimony.—Sketch showing comparison of rates, Knoxo, Miss., to Cincinnati, Ohio, etc. [omitted in printing]---- 353
Exhibit No. 13 to Sheppard's testimony.—Table showing comparison of rates from Knoxo, Miss., to representative points with rates from other points of equal distance [omitted in printing]-- 354
Exhibit No. 14 to Fush's testimony.—Statement of revenue freight carried in 1916–1918, inclusive, by F. & G. R. R. Co. [omitted in printing]---- 370
Exhibit No. 15 to Fush's testimony.—Letter, Fernwood Lumber Co. to F. & G. R. R. Co. [omitted in printing]---- 371
Exhibit No. 16 to Fush's testimony.—Extract from I. C. C. valuation report of F. & G. R. R. Co. [omitted in printing]---- 372
Exhibits Nos. 17 and 18 to Fush's testimony.—Statement of assets and liabilities of F. & G. R. R. Co. [omitted in printing]---- 373
Exhibit No. 19 to Fush's testimony.—Statement of operating revenues and expenses of F. & G. R. R. Co. [omitted in printing]---- 375
Exhibit No. 20 to Fush's testimony.—Statement showing profit and loss of F. & G. R. R. Co., 1915 to 1917 [omitted in printing]---- 376
Exhibits 21 to 25, inclusive, to Fush's testimony.—Financial statement of F. & G. R. R. Co. [omitted in printing]---- 377
Exhibit F to bill of complaint.—Exceptions of Swift Lumber Co. to tentative report of examiner [omitted in printing] ---- 383
Exhibit G to bill of complaint.—Exceptions of Fernwood & Gulf R. R. Co. et al. to tentative report of examiner and brief in support of same [omitted in printing]---- 384
Answer to exceptions [omitted in printing]---- 385
Order substituting Walker D. Hines as defendant [omitted in printing]---- 386
Answer to exceptions [omitted in printing]---- 387
Order substituting John Barton Payne as defendant [omitted in printing]---- 388
Order of I. C. C. modifying its order of April 5, 1921 [omitted in printing]---- 389
Exhibit J–1 to bill of complaint.—Petition for reargument before I. C. C. [omitted in printing]---- 390
Petition for rehearing and reargument [omitted in printing] ---- 391

Record from United States District Court for the Southern District of Mississippi—Continued.

	Original.	Print.
Bill of complaint—Continued.		
Exhibit J–3 to bill of complaint.—Answer to petition for rehearing and reargument [omitted in printing]	392	
Order denying petitions for rehearing and reargument [omitted in printing]	393	
Order of I. C. C. amending its order of April 5, 1921 [omitted in printing]	394	
Brief for defendants before I C. C. [omitted in printing]	395	
Brief for F. & G. R. R. Co. et al. before I. C. C. [omitted in printing]	396	
Brief for complainant before I. C. C. [omitted in printing]	397	
Minutes of hearing before I. C. C., May 15, 1922 [omitted in printing]	398	
Argument of Garner W. Green [omitted in printing]	401	
Argument of A. P. Humburg [omitted in printing]	421	
Argument of L. Palmer [omitted in printing]	433	
Minutes of proceedings before examiner, October 31, 1919 [omitted in printing]	438	
Exhibit No. 3 to Kimball's testimony.—Supplemental complaint of Swift Lumber Co. before I. C. C. [omitted in printing]	441	
Certificate of secretary of I. C. C. [omitted in printing]	448a	
Order setting cause for hearing, etc	449	158
Motion of I. C. R. R. Co. et al. for preliminary injunction	450	159
Motion for order setting time and place for hearing motion for preliminary injunction	454	160
Motion of I. C. R. R. Co. and F. C. & G. R. R. for preliminary injunction	457	162
Notice of hearing on application for preliminary injunction	461	162
Correspondence re hearing [omitted in printing]	462	
Motion of the United States to dismiss bill of complaint	468	163
Answer of the Interstate Commerce Commission	473	164
Motion of Swift Lumber Co., intervenor, to dismiss bill of complaint	477	166
Order granting preliminary injunction	478	167
Bond on preliminary injunction	482	168
Writ of injunction	486	169
Answer of Swift Lumber Co. to bill of complaint	487	170
Motion to assign cause for final hearing	499	179
Order assigning cause for hearing	502	179
Final decree	504	180
Petition for appeal	506	181
Assignment of errors	509	181
Order allowing appeal	512	183
Citation and service	514	184
Clerk's certificate	515	184
Designation by United States to omit parts of record	516	185
Stipulations as to printing of record	522	186

[Title omitted.]

In the District Court of the United States for the Jackson Division of the Southern District of Mississi

THE ILLINOIS CENTRAL RAILROAD COMPANY ET AL., PLAINTIFFS,

v.

THE UNITED STATES, DEFENDANT.

BILL OF COMPLAINT.

To said Court:

Your orators, the Illinois Central Railroad Company, a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Mississippi, wherein it has its legal domicile (hereinafter called Central Company), and the Fernwood, Columbia & Gulf Railroad Company (formerly Fernwood & Gulf Railroad Company), (hereinafter called the Fernwood Company), a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Mississippi, having its residence and legal domicile therefor in the town of Fernwood, county of Pike, State of Mississippi, suing on behalf of themselves and of other carriers affected by the order hereinafter complained of, who may desire to join herein and assume their proportional part of the costs and expenses, most humbly complain of the United States, and for cause of action state:

2 I.

Heretofore Swift Lumber Company, a corporation chartered, organized, and existing under the laws of the State of Mississippi, having its residence and legal domicile at Knoxo therein, in the Southern District, State of Mississippi, filed its certain complaint, which was amended and supplemented, before the Interstate Commerce Commission and numbered on the docket of said commission #10827, whereby and whereunder said Swift Lumber Company, suing upon behalf of itself alone, alleged upon the part of divers carriers, and especially of the complainants herein, a violation of sections 1, 2, and 3 of the interstate commerce act, copies of said petition being hereunto annexed, marked Exhibit "A" and made parts hereof as fully as if at length copied herein. Said petition was filed July 2, 1919, and it alleged that the rates on yellow-pine lumber from Knoxo to points in Louisiana and to points in central traffic territory, and other territory, were unjust and unreasonable in and of themselves; that said rates, so then in effect, were unjustly discriminatory against both the petitioner, said lumber company, and said locality, Knoxo, in this, that there was exacted for the movement of said yellow-pine lumber an arbitrary of 2c. over the rates contemporaneously in effect from points on the Illinois Central, the New Orleans Great Northern, and other lumber-line systems (in-

cluding their several branches), and that the exaction thereof by said Fernwood Company was in violation of said sections 1, 2, and 3 of said interstate commerce act.

3 II.

Said petition, so filed by said Swift Lumber Company, was thereupon answered by several of said carriers, especially said Central Company and said Fernwood Company, wherein thereby the said carriers denied that they individually or in conjunction with others published, maintained, and/or collected any rates that were either unreasonable, unjust, excessive, and/or unduly discriminatory for the transportation of yellow pine lumber, timber, and other sawmill products from Knoxo, Mississippi, to the interstate points more particularly set forth in said petition; and denied that either individually or collectively the carriers had, in any way, published or collected any rate in contravention of the act to regulate commerce. By said answers it was further set forth that the 2c. arbitrary over the junction point was not unjust or discriminatory against either Knoxo or the complainants. Respondents further denied that there was any blanket rate covering the territory wherein Knoxo was situated; and denied that the Illinois Central or the New Orleans Great Northern, being the only connections at that time of the Fernwood Company, have pursued a policy of naming the same rates from stations upon independently owned and operated short lines as were contemporaneously in effect upon their own system.

Specifically and severally the Fernwood Company set up that its line was a public carrier for hire, and that said Fernwood Company was not receiving for any operations of its road adequate revenue for the purpose of properly serving the public; that said Fernwood Company road was constructed solely to move to market

4 timber thereunto adjacent, and after being utilized therefor by those so owning timber will become without value and have to be junked, so that in addition to a reasonable revenue return upon said investment said Fernwood Company is entitled to create a reserve which, at the end of said lumbering operations, will vouchsafe to those who have invested in said securities a return of capital.

That, thus, the Fernwood Company is therefore entitled to assess against each of the parties utilizing its line for the transportation of timber to market an adequate depreciation charge to vouchsafe such capital return, but that up to this time, instead of so having said capital return vouchsafed, if the rates now in effect are reduced the result will be impairment of the Fernwood Company's financial condition to such an extent as to make receivership inevitable and dismemberment a question of but a short time, as has been the case actually with the Liberty White Railroad, which lies immediately north of said Fernwood line, east of the Illinois Central.

It was further alleged in said answer that if said road was constructed for the purpose of serving the public by bringing to market

timber adjacent to its line, and that without its said line being so constructed said timber was not available, and said timber thus made available is accessible with a return upon the capital investment to vouchsafe the capital return at the end of the operating period.

III.

Said carriers further averred that the rate structure in the territory in question had been in effect for many years, and that said Swift Lumber Company, the sole petitioner, was advised of its existence at the date of the establishment of his mill, and acquiesced therein; and averred that the additional charge necessary to haul said lumber to the main trunk line found expression in the price at which said Swift purchased said timber, in this, that it was less than the price paid for timber of the same kind and character adjacent to trunk lines.

The carrier denied that Swift is the only one charged a rate in excess of said alleged blanket rate averred to exist, but which does not exist in fact; and denied that said Swift was obliged to sell his product in markets in competition with practically the entire output of yellow pine in the group described; and the carriers averred that the prices are controlled largely by stumpage values, and that such values at such points as remote as Knoxo are lower than values at main line points, and that trunk line points have to take into consideration the cost of timber, which, the carriers aver, more than offsets the alleged discriminations arising in said rates.

To the supplemental petition full denials were likewise made. Copies of said answers are hereto annexed, marked Exhibit B 1, etc., and made a part hereof by adoption as fully as if copied herein.

IV.

That thereafter, in pursuance of the issues so joined, said cause was set down for hearing in the city of Chicago upon December 18, 1919, whereat were present the said Swift Lumber Company by its attorney, Hon. L. Palmer, the Central Company by its attorneys, and Fernwood Company by its attorneys, and thereupon, to sustain the issues in the cause made, said complainants introduced its witnesses, J. B. Kimball and L. Palmer; and said carriers introduced their witnesses, J. L. Sheppard, G. B. Auburtin, J. M. Fush, T. J. Quigley, and G. H. McElroy, and that the evidence then and there taken, with the several exhibits in support thereof, is hereunto annexed, marked Exhibit "C," and made a part hereof by reference as fully as if copied herein at length. That thereby epitomized it was shown:

1. The rate from Knoxo per se was not unreasonable, compared with similar rates contemporaneously in effect.

2. That said Knoxo was a station upon the Fernwood line, which was a single-line track railroad 32 miles long, Knoxo being located

27 miles east of Fernwood and six miles east of Tylertown, and that prior to May 21, 1906, rates from all points on the Fernwood line were made by adding the full local to Fernwood, plus the rate from Fernwood to destination, but effective that date rates were published from local points on the Fernwood line 2c. higher than those in effect from Fernwood. That the Illinois Central, with its affiliated companies, connected in this territory with eight short-line carriers, to none of which the junction-point rate extended, but that lumber moving from local points thereon took a rate from one (1) to 4½ cents higher than the junction-point rate; and that the general practice throughout the Mississippi Valley and the Southeast was to make rates from independently operated short lines by adding an arbitrary to the junction rate; it appearing that there were ninety-five short lines in the territory east of the Mississippi and south of the Ohio, and that on such short lines this rate structure existed on fifty-five, while on twenty-seven there was a combination of locals, whereas the junction-point basis applied only on thirteen, and as to those thirteen especial causes were applicable.

3. Swift Lumber Company wholly failed to show the unreasonableness of the rates.

7 4. Swift Lumber Company failed to show any act upon the part of the Fernwood Company whereby it had in any way, at any time, departed from its uniform practices of plussing the junction point rate, and that when the Great Northern road was constructed into Tylertown it received fourth section relief from the commission by reason thereof.

5. That said Swift Company made a specific contract to haul its tonnage over the line of the Fernwood Company at the rate then in effect (including said arbitrary) in consideration of the conveyance to it of certain rights of way and mill sites, in possession of which said Swift Company then was and still is enjoying the same in virtue of its contract.

6. Said Fernwood Company was constructed for the removal of timber situated in adjacent territory, over ninety per cent of its tonnage being such timber and timber products, and when said timber has been removed there would be no adjacent tonnage to take its place, as a result of which said road would have to discontinue operations, and thereby said Fernwood Company was and is entitled to allocate to each unit of timber therefrom removed a capital charge sufficient to retire its outstanding capital obligation when the timber operation ceased.

7. Said evidence is not in conflict to any material extent, and said complainant, Swift Lumber Company, wholly failed to meet the burden of proof upon it imposed, and, on the contrary, the carrier sustained each and every issue, and thereby became entitled to a dismissal of said petition.

8. The testimony clearly shows that the rate in question and under attack is not unreasonable, and further shows that this rate is

8 not discriminatory and does not in fact operate to the undue

or unreasonable preference or advantage of any person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, nor does it subject any person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. No substantial testimony was offered, nor does there appear in the record any showing that the rate was unreasonable or operated to the disadvantage of any person or community.

Direct reference to said evidence is specifically made and the same integrated into this bill by reference, and is not set forth at length merely to save prolixity.

V.

That thereafter said cause was duly briefed by L. Palmer on behalf of said complainant and by counsel on behalf of the carriers, and copies of said briefs are hereto annexed, marked Exhibit "D" 1, etc., and made parts hereof, as if fully copied herein.

VI.

That thereafter the Hon. J. Edgar Smith, examiner, who heard the said cause, made his certain report, which was filed with the Interstate Commerce Commission upon the 29th day of March, 1920. A copy of said report is hereunto annexed, marked Exhibit "E" and made a part hereof as if fully copied herein. And thereunder J. Edgar Smith found that:

(1) That the rates in and of themselves were not shown to be unreasonable;

9 (2) That the rates were not shown to be unduly discriminatory either as against the shipper or as against the locality, and in virtue of the power in him vested, proposed that the commission should find that petition be dismissed and the petitioner denied reparation.

VII.

That thereupon said Swift Lumber Company excepted to said finding of fact and of law made by said Hon. J. Edgar Smith, examiner, as more fully appears by Exhibit "F," hereunto annexed and made a part hereof as fully as if copied herein, and by said exception, by reiterated and prior contentions, set forth in said original and supplemental petition, contending that said examiner should have found from the evidence:

(a) That said rates were per se unreasonable;

(b) That said rates were unduly discriminatory: 1st, as against the shipper, and 2nd, as against Knoxo, Mississippi, and

(c) That reparation should be awarded upon the basis of the supplemental petition.

VIII.

That likewise said Fernwood Company excepted to said report in so far as:

(a) It failed to find that a specific contract was made and entered into by and between said Swift Lumber Company and the predecessor in interest, the Fernwood Company, from which it was subsequently lawfully severed, whereunder and whereby, in consideration of a certain conveyance made, said Swift Lumber Company had assumed and undertaken to pay the arbitrary exacted, and that therefor had entered into a binding contract, the consideration whereof it still retained and enjoyed.

10 (b) And that in so far as said examiner failed to find that under the law there was a right in the Fernwood Company to allocate a capital retirement charge against each unit of timber removed, in virtue of the fact that said Fernwood Company was constructed but for the removal of a definite tonnage which, when removed, would necessitate its abandonment, and that the other tonnage was but an incident, and thereby its public use was limited both in time and in character, and in virtue of such limitation a capital return from the principal commodity served should have been given under the constitutional guaranty. Copy of said exceptions is hereunto annexed, marked Exhibit "G," and made a part hereof as if fully copied herein.

IX.

That thereafter said cause was duly argued before a division of the commission, consisting of Commissioners Hall, Daniels, and Woolley, upon the pleas and proceedings had and done, including said report, and the briefs there filed are hereto annexed, marked Exhibit "H" 1, etc., and referred to as fully as if set forth herein at length.

Complainants aver that all of said issues should have been found by the commission in favor of the carriers, and that the petition of said Swift Lumber Company should have been dismissed. But notwithstanding thereafter, upon April 5, 1921, when the commission was composed of eleven members, a decision was arrived at and published as of that date by five commissioners; three commissioners dissented and three commissioners, at the time of the publication of said decision, being on the commission, did not participate in the decision. So that said decision, a copy of which is hereunto annexed, marked Exhibit "I," was rendered by five commissioners, not

11 one of whom heard the oral argument of said cause before the commission, but two of those who dissented, to-wit, Commissioners Daniels and Hall, holding with the Hon. J. Edward Smith, examiner, did hear said oral argument and were thereby induced to confirm the contentions of the carriers. Commissioner Woolley who heard the oral argument had ceased to be a member of the commission at the date of decision.

X.

Complainants aver that under said decisions made by said five commissioners, dissented from by three, that the act to regulate commerce had been violated, and said decision and the order, in virtue thereof made, is in excess of the statutory power of said commission, and furthermore that said order is contrary to the Federal Constitution in this, that it deprives carriers of their property without due process of law and taxes their property for private use without due compensation in this, that the sole party complaining in said Swift Lumber Company *v.* The Fernwood & Gulf Railroad Company et al. was the said lumber company; and complaints aver that Swift Lumber Company located its plant upon the line of the Fernwood Company when the same was the property of the Fernwood Lumber Company, and thereafter when a segregation occurred by which said lumber company was divested from the railroad company, the railroad company, by virtue of such diversion, became entitled to have, demand, and exact that said Swift Lumber Company should do and perform its certain covenant and contract whereby it undertook and agreed to ship all of its output over said Fernwood line at the rates in effect, embracing and including said arbitrary, and that in consideration of such agreement, as
12 appears by the exhibits to said evidence so taken, said lumber company received valuable rights of way and other property in virtue of which it is now enjoying its facilities, and which, but for its contract so thus to remove its tonnage, it would not have been allowed to become the owner of.

XI.

Complainants aver that by making said contract said lumber company became estopped to complain of an alleged discrimination under sections 2 and 3 of the commerce act, because it had voluntarily, with knowledge, agreed to the exaction of the arbitrary as a consideration for the receipt by and to enjoyment of certain privileges to property; and having received and enjoyed such privileges and such property it was not competent, while so in the receipt and in the enjoyment thereof, to challenge as discriminatory that whereunto it had voluntarily assented, and in virtue of which assent obtained the benefit for its said business which it still enjoys under such agreement.

Complainants aver that said cause before the commission was instituted solely by said Swift Lumber Company, so thus circumstanced and situated, being cause #10,837; and complainants aver that the commission can not enter an order at the instance of a person estopped to seek relief as against carriers, even though relief might be granted where the parties seeking said relief were entitled to demand the same under the law.

Complainants aver that the possession by the petitioner of the right to file this petition at the date of its filing and the possession by such Swift Company of a right to challenge said rate structure was and is a condition precedent to the power of the commission to enter an order vouchsafing the alleged right so sought to be
13 asserted, and that an order made by the commission in a proceeding against the carriers wherein there is but one complainant and such complainant is estopped to question the fact complained of, is beyond the power of the commission, null and void, and the orders made therein wholly unenforceable.

Complainants aver that after the making of said order that a petition for a rehearing and a reargument was duly filed by all of the carriers interested, as shown by exhibit hereto marked Exhibit "J" 1, etc., and made a part hereof as fully as if copied herein; and that at the same time said Fernwood Company filed its separate several petition, likewise shown by said Exhibit "J" hereto annexed, thereunder seeking to have a rehearing and to vouchsafe to said company its statutory and constitutional rights more at length in this bill set up, all of which are prayed to be taken as a part hereof as fully as if copied herein at length.

These applications for a rehearing and a reargument were, however, by the Interstate Commerce Commission overruled and denied by its order entered on July 5, 1915, which, omitting the formal parts, reads as follows:

"Upon further consideration of the record in the above-entitled proceeding, and of the petitions for rehearing or reargument filed on behalf of the defendant, Fernwood and Gulf Railroad Company, and of all other defendants herein:

"It is ordered, That the said petitions be, and they are hereby, denied."

9. Complainants aver that the rates exacted from Knoxo, save those undoubtedly unreasonable by being a combination of locals, were found reasonable and just by the commission in and of themselves under the act to regulate commerce.

14 10. Complainant, the Fernwood Company, specifically avers that the line of the Fernwood Company was constructed solely, exclusively, and only for the purpose of conveying to market the timber and timber products upon that territory adjacent to the line of said road as now constructed; and that its other tonnage is only incidental, amounting to only about seven per cent; and avers that when said timber thereto adjacent is therefrom removed by said railroad company for the benefit of those owning said timber, that the principal public service of said Fernwood Company will cease, in virtue of it having accomplished the reason of its being. Complainant Fernwood Company avers that it has outstanding five hundred thousand ($500,000.00) dollars first-mortgage gold bonds, which are wholly unpaid, and are secured by a first lien upon its line of railroad. Said company avers that it has issued two hundred thousand ($200,000.00) dollars refunding mortgage bonds, which con-

stitute a second and subordinate lien but which are due and owing by it to persons who have lawful claims against it, and that said bonds issued for $200,000.00 was duly and regularly authorized to be made by it in virtue of the provisions of the transportation act of 1920; and in addition to said first and second mortgage bonds that it has outstanding one hundred thousand ($100,000.00) dollars of capital stock fully paid and non-assessable, representing an actual out-of-pocket capitalized property account aggregating eight hundred thousand ($800,000.00) dollars; that said $800,000.00 so thus represented has been invested for the use of the public in a property solely utilized in the transportation of timber adjacent to market, and that its public function is to overcome a place disadvantage of the timber located along its line, and that when such place disadvantage has been overcome for the owners of said timber
15 and said timber being removed to market that there will be no adequate tonnage for its line to haul, and its period of usefulness will be at an end, and that its death as a commercial enterprise will occur, in virtue of a coordination which coordinated its public function with the removal of said timber. Said Fernwood Company specifically avers that under the Constitution it is entitled to have a return upon the property devoted to the public use, and also to create a capital retirement reserve equal to $800,000.00 in virtue of the devotion of that amount to the specific public use of bringing to market said tributary timber; and that it is entitled to levy against such tributary timber a rate or charge for the transportation in addition to what would otherwise be charged, so as that when said timber has all been removed and the road ceased to exist its projectors will receive a return of the capital in it invested from the tonnage it was built to serve.

Said Fernwood Company avers that to thus devote its property to such public use gives the public a right to so use said property, but upon the express condition that just compensation shall be therefor made. That neither the public nor any of its component parts is compelled to use its property so thus devoted, but if used the attendant condition must be complied with, and that this company is entitled to such rates as will fairly compensate it for the services rendered, and for depreciation of its property included in such service, even though in so doing it reach the vanishing point. In other words, the Fernwood Company, under the Constitution, is allowed to come out even in an understanding such as exhausts the value of the property, and in addition is entitled to receive a fair compensation for the services when being rendered, and that no carrier ought to be compelled to sacrifice its plant and be
16 content merely with compensation amounting only to interest. To ignore this principle would be to violate the fifth amendment, and no public service corporation can be expected to sacrifice its property for public use without compensation therefor made; and it is entitled to earn not only what will meet current repairs but to provide a means of replacement when it ceases to be of value. A

fully equipped railroad built on a circle within a radius of one hundred miles from the North Pole would be, at the present day, utterly valueless; there would be no traffic. And differing only in degree will be the railroad of the Fernwood Company, running into a logged-off barren, where there will be nothing for it to haul and no use to which it could be put. The Fernwood Company avers that the failure to provide against the loss incident to depreciation, depletion, and obsolescence has been the undoing of more enterprises than any other single cause, and that under the Constitution a carrier, circumstanced as it is, has a right to exact, under the fifth amendment, a capital return reserve to be imposed against each timber unit removed from the tributary territory. And complainants aver that said commission, when they failed to give effect to this right, thus vouchsafed under the Constitution, exceeded the statutory powers, invaded the constitutional rights, and the order made therefor was void.

XII.

Complainant, Fernwood Company, is the owner of a single track road, of standard gage, extending from a connection with the Illinois Central at Fernwood eastwardly, and a junction with the New Orleans Great Northern at Tylertown; thence of twenty-seven miles; and thence further eastward to a junction with the Gulf & Ship Island and the New Orleans Great Northern at Columbia, Mis-
17 sissippi. Prior to 1908 the only trunk-line connection of said Fernwood Company was the Central Company, and prior to May 21, 1906, lumber rates from all points on its lines to all destinations were made by combining its full local rates to Fernwood and the rates beyond. Effective this date, however, rates were published from local points which were 2c. higher than the rates from Fernwood, and this is the present basis for joint rates to the Ohio River and points beyond. The excess over the junction-point rate, in all cases, accrues to the Fernwood Company in addition to the division which it receives out of the joint rates. Complainant, Fernwood Company, avers that it has never named a lumber rate to the territory covered by the order here attacked other than in accordance with the principle of adding to the junction-point rate a reasonable amount for the overcoming of the place disadvantage, and that it has been forced, where its line joined the Illinois Central and the New Orleans Great Northern and the Gulf & Ship Island roads, to make from these points, but from none other, a rate to the territory here in controversy not exceeding the rate then exacted from said points by its competitors, said trunk lines.

Said Fernwood Company avers that it is an independently owned and operated line, not affiliated with, controlled by, or dictated to by any of its connections. And avers that under the act to regulate commerce and the fifth amendment and the Federal Constitution its individualization cannot be merged into a policy by connecting carriers whose interests are adverse and whose policies are constructed

for their own conservation, even though in so being they involved the disorganization and destruction of the Fernwood Company. It avers that under the Constitution the public has no right to become its general manager, save and except in so far as it may vio-
18 late the law, but that its individualization, its separate policies, promotive of its welfare, lie beyond the constitutional power of the commission, and it cannot be thereof deprived in virtue of the consummation of a theory of the commission, which it avers has no foundation in the fundamental facts thereunto applying. And it avers that the order of the commission, whereby its individualization is sought to be merged into a conformity with the alleged policy of its competitors, is unauthorized by the act to regulate commerce, and is in violation of the fifth amendment to the Federal Constitution.

XIII.

Complainant, said Central Company, avers that it has eight (together with its affiliated companies) independent short line carriers connecting with it, and that to none of them does said alleged blanket rate extend. And that beginning at a point on the Mississippi River, extending thence east to Norfield, Mississippi, thence east to the Pearl River, thence south to the Gulf of Mexico, thence to the mouth of the Mississippi River, thence up said river to the point of beginning, there is a territory in which there has never been a blanket rate covering independently operated short lines, but that each independent short line in said territory has, in virtue of its individual discretion, plussed the junction point rate to the extent of from one to four and five tenths cent, and from said short lines so in said territory there has never been, and is not now, in effect a uniform blanket rate, and the rates there in effect have been established by the individual decisions of each of the carriers, and not by a coordinated effort of the blanketing, and by reason thereof no power exists in the commission to destroy the individualization existing, by attempting the enforcement of rates, when such
19 individualization has been persistently maintained by the carriers' services, and thereunder, satisfactorily, has been removed nearly seventy-five per cent of the lumber tonnage. In short, the individualization of lumber rates by the several carriers heretofore and now existing does not warrant in this territory an order of the commission taking away from the carriers their individual right of coordinating rates for their own welfare when said carriers will thereby be deprived of their property without due process, and have their property taken for private use without due compensation.

XIV.

Complainants aver that the commission is without power in the southeastern territory to promulgate a general policy eliminating the plussing of junction point rates by independently owned and operated short-line carriers. Complainants aver that there are

ninety-five such carriers in the territory east of the Mississippi River and south of the Ohio River, and that the rates on lumber from local points on these roads have arbitraries added in fifty-five cases; in twenty-seven cases they are made on a combination of locals; while in thirteen cases is there in effect the junction point rate; and complainants aver that in nearly all, if not all, of said thirteen cases there are special reasons existing whereunder and whereby said junction point rates are projected; and aver that in each and all of said cases said short-line carriers asserted, and have asserted, the right so thus to fix as individual acts either the junction point rate or an arbitrary thereover, and that it is beyond the power of the commission to promulgate, as is here sought to be done, a general principle, to be made enforceable throughout the United States, whereby short line independently operated
20 railroads will be compelled to coordinate the rates to the junction point rates, and the result will be either that the short lines will receive wholly inadequate revenue by losing the arbitraries collected, which were absolutely essential to their maintenance, or the trunk lines will be compelled to increase divisions, so as to vouchsafe adequate revenue to the independent short lines, either of which alternative will result in an injustice to the respective parties. And complainants aver that so thus to reduce rates at the present time would be in violation of the transportation act of 1920, and the Constitution of the United States, fifth amendment, in this, that the revenue now received by complainants for the rendition of the services is not commensurate with those whereunto complainants are entitled under the transportation act or under the Federal Constitution. And complainants aver that such elimination of the revenue, properly chargeable to those localities upon short lines, and the compelling of those localities on main lines to absorb the same, is beyond the power of the commission, especially when, as here, said parties located on said short lines receive a distinct advantage in the cost price of its stumpage, which reflected the place of disadvantage on said short-line roads. And now to compel those parties who own said trunk lines to absorb for the benefit of such short-line shippers, this place disadvantage, reflected in the purchase price of property, is an unjust, unreasonable, and unlawful transaction, and beyond the power of the commission, both under the interstate commerce act and transportation act and the Federal Constitution.

XV.

Complainants aver that said commission was further without power to enter said order coordinating the rates upon the in-
21 dependent short lines with the rates existing upon the trunk lines and their branches, because complainants say that none of said trunk lines reach Knoxo, Mississippi, and that the Fernwood Company is the only company therefrom moving yellow pine tonnage, and that said movement is at rates that are reasonable in

and of themselves; and that the rails of the Fernwood Company are the only rails reaching said Knoxo, and that at no point upon said line, save where competition otherwise fixes the rate, is there a rate now in effect otherwise than the junction point rate plus the arbitrary; and complainant, Fernwood Company, has, in each instance, consistently plussed said junction point rates from all of its stations, and this plussing was done by said Fernwood Company in virtue of its individual operation of its independent short line; and complainants aver that it is not within the power of the commission to coordinate the rates of one carrier to and with the rates of another and distinct carrier; nor is it within the power of the commission to admeasure the rates to be charged by one carrier for services on its line with those upon other and differently situated lines, and compel each line, when the rates thereon charged are reasonable, to observe the rates promulgated by its competitors. Complainants aver that competitors are not thus under the law given the right to control individual, independent rates of carriers, but that under sections 2 and 3 an election is given each and every carrier as to whether or not it will meet competitive rates; and its election to meet competitive rates at points where such rates are in effect does not thereby discriminate against those points where such competitive rates do not exist, by reason of the fact that the carrier naming such rates does not have its lines running thereto. Complainants aver that it is beyond the power of the commission to eliminate individual action of each carrier and make each in-
22 dividual action conform to the rates promulgated by competitors and thereby deprive individual carriers of those powers of direction whereunder they may conserve the individual carrier's welfare, and that such a policy, if universally adopted, would forthwith destroy the independence of every carrier, and make the usual rate named by the shortest line carrier controlling in admeasuring the compensation for the services to be performed; and thus to vest the control of a carrier in its competitor, as is sought to be done by the order here, is contrary to the interstate commerce act, the transportation act, and the Federal Constitution.

XVI.

Said Central Company has consistently pursued a policy whereby it has refrained from making effective from points upon independently operated short lines the same rates as were contemporaneously in effect from its own station. That said policy of said Central Company has been universal and consistent, and that no discrimination has been made by said Central Company in favor of any place located upon any independent short-line connection; and that said Central Company has never attempted to establish, as to such stations, said located upon independently operated short lines, any rate, whatsoever, but has consistently refrained from at-

tempting to make rates from all stations, and has but done nothing more than conserve its own revenues by making effective from the territory served by it individually such rates as would vouchsafe the movement of tonnage requisite to insure the prosperity of dependent industries; and said Central Company says that it is beyond the power of the commission, by said order, to thwart this fundamental policy, continued from time out of mind by the Central Com-
23 pany, and compel it to coordinate its theory of proper rate making to a hypothesis now sought to be converted into a theory by the commission through the promulgation of orders similar to that herein sought to be made.

XVII.

Complainants aver that for the services rendered in the transportation of lumber at the present rates, with the convertible value of money, that the rate upon lumber is lower, and to further reduce it by the elimination of the arbitrary would be to deprive complainants of their property without due process of law and compel them to render a service for said shippers at a lower figure than that which, under the Constitution, they are entitled to exact, in view of the provisions of the transportation act.

XIX.

Complainants further aver that said order is not based upon any substantial evidence which will support and justify it, since all of the evidence offered shows that the rate in question does not discriminate against either persons or localities, nor does it subject any person or locality to any unreasonable prejudice or disadvantage. The finding of the commission is based upon discrimination. As shown in the report of the commission, the only discrimination which is even suggested as ground for making the order grows out of the fact that the Illinois Central Railroad extends the junction-point rates to points on the Mississippi Central Railroad and participates in certain through rates on lumber originating on certain small railroads, to wit, the Alabama & Mississippi Railroad, the Mississippi & Western Railroad, the Cybur & Northern Railroad, and the Pearl River Valley Railroad. Complainants show that all the testi-
24 mony offered in this case clearly indicates that the conditions surrounding the making of rates to points on the Mississippi Central Railroad are entirely different from those that attend the making of rates from Knoxo, the point involved in this case, and that the Illinois Central Railroad in extending junction-point rates on the Mississippi Central acted under the force of compelling competition, and could not therefore be guilty of discrimination, and that this action can not constitute discrimination as against Knoxo. So far as the other short-line railroads mentioned in the commission's decision are concerned, no one of them is a connection of the Illinois Central or of the Fernwood, Columbia & Gulf Railroad, and these

complainants can not therefore in any sense be responsible for rates which prevail on those roads. The complainants show, therefore, that the order of the commission basing its finding upon discrimination has no substantial support in the evidence is therefore beyond the authority of the commission to make, and is consequently null and void.

XX.

An examination of the commission's opinion in this case shows that it based its conclusion very largely upon another case formerly decided by the commission, that being the case known as McGowan-Foshee Lumber Company v. F. A. & G. Railroad Company, 43 I. C. C. 581. It is evident from the examination of the commission's report and from the testimony offered in the present case that the commission decided this case not upon the testimony offered in this record but in pursuance of a policy which it had adopted covering all roads in the Southeast, and which was first announced in the said McGowan-Foshee case, that policy being to force into effect from points or short-line railroads rates not higher than from junction points, regardless of the peculiar conditions that surround the particular roads involved in the particular controversy. In other words, complainants assert that the decision in this case is not based upon the facts disclosed by the record, but is in pursuance of a certain policy adopted by the commission, based on facts which were developed in other cases and which have no application to the case in hand. Complainants point out that by the order of the commission the rates from Knoxo are ordered to be placed on the same basis as the rates from junction points Fernwood and Tylertown, yet nowhere in the commission's decision is there any finding that the rate from Knoxo is discriminatory as compared with the rates from Tylertown and from Fernwood. The commission's whole opinion is based upon the theory that discrimination exists by reason of rates in effect from Mississippi Central points and from points on the other short line railroads mentioned in the commission's decision. No opportunity, however, is given to remove the discrimination by increasing rates from points on the Mississippi Central and points on the other short lines, the only option being to increase the junction point rates from Tylertown and Fernwood, or lower the rate from Knoxo to the junction point basis. The opinion of the commission is therefore illogical and has no substantial support in the testimony.

XXI.

Complainants further aver that said order is contrary to the law and in violation of the powers conferred upon the commission in this, that said rate, so exacted, is not discriminatory within the purview of said act under the record made before said commission either (a) as to the shipper or (b) as to the point of shipment. And that

said record shows absolutely no discrimination within the condemnation of the statute, and said order, seeking to adjudicate a discrimination under the record herewith submitted, goes beyond the statutory and constitutional power of the commission, and is, for that reason, void.

XXII.

Complainants further aver that said commission erred in its interpretation of the law in holding that there was (a) a discrimination as to the shipper and (b) a discrimination as to the place of shipment, by the enforcement of the arbitrary, under the individual policy of a shipper upon whose lines the shipper and place of shipment were located, when said shipper and place of shipment were not located upon, or accessible to, any other rails than those of the Fernwood Company.

XXIII.

Complainants aver that the commission is here seeking to create a general elimination of individual action by short carriers, and seeking to control the rate structure by those contemporaneously in effect on lumber trunk lines, and that such action is beyond the power of the commission in the premises.

XXIV

Complainants aver that irreparable damage will accrue from the enforcement of said order by the commission, but that notwithstanding the foregoing said commission has ordered that said rate structure be coordinated and the arbitraries eliminated, and that from and after September 5, 1921, that the rates on lumber from
27 Knoxo be the same as those contemporaneously in effect from Fernwood and Tylertown, and that, unless and except this order be enjoined and restrained by this honorable court, irreparable injury to complainants will accrue.

XXV.

Complainants aver that said order, made upon April 5th and thereafter succeeded, as shown by Exhibit —— hereto annexed and made a part hereof as if fully copied herein, is absolutely null and void for the reasons hereinbefore set forth, but that unless enjoined and restrained the same shippers will compel the complainants to conform thereto and thereby irreparably damage the carriers through the unconstitutional order above made, through the, if not unconstitutional, void order, in excess of constitutional power, by said commission assumed to be made. That there is no plain, adequate, and complete remedy at law. That the shippers who would exact the performance are in large measure insolvent; that there would be a

multitude of suits over trifl'ng amounts, which, when collected, would substantially be consumed in the cost of collection. That complainants are in dire need of the revenue, and if the order is valid they can be made to refund to whomsoever may be thereunto lawfully entitled, but if said order is allowed to go into effect, and it is void, then said complainants will be forever deprived of the revenue therefrom lawfully due, because the costs of the collection will be in excess of the amounts received, even if any amount whatsoever is received, because of the insolvency of the shippers and the uncertainty as to whom the liability therefor attaches. That the sole remedy therein is by injunction.

Premises considered, complainants pray that the parties
28 named in the caption hereof be made parties defendant hereto and that they be required to plead, answer, or demur, but answer under oath is expressly waived; that said order made in pursuance of the opinion of the commission of date April 5, 1921, be annulled and set aside and for naught held, a copy of the same being annexed hereto as a part hereof, and also the order postponing the effective date thereof to September 5th, this being a direct attack thereon; and that restraining order be issued herein, restraining the defendants from making said order effective, in any way, or to any extent whatsoever, and thereby preventing irreparable damage therefrom accruing; and that a temporary injunction, which shall upon final hearing be made perpetual, enjoining, restraining, and annulling said order of April 5, 1921, and all other orders extending the said order of April 5, 1921; and that complainants be given such other, further, and general relief as in equity and good conscience may seem meet.

And as in duty bound, etc.

Attorneys for Plaintiffs.

29 STATE OF MISSISSIPPI,

County of Pike, Town of Fernwood, ss:

Personally appeared before me, the undersigned officer, the within named Fush, who having been by me first duly sworn, states that he is the general auditor of the Fernwood, Gulf & Columbia Railroad Company, which is a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Mississippi, and that he was personally present at the time of the taking of the testimony in this cause in Chicago, be-*be*fore Examiner J. E. Smith, and is personally familiar with this controversy in all of its aspects, and upon such familiarity states that the foregoing facts set forth in the original bill herein are true and correct and accurate in so far as stated upon his own personal knowledge; and that things therein appearing to be stated upon information and belief, he verily believes to be true, upon his own personal information and belief.

Sworn to and su'scribed before me, this —— day of August, 1921.

---

30 *Exhibit A to bill of complaint.*

Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
FERNWOOD & GULF RAILROAD COMPANY, WALKER D. Hines, Director General, et al., defendants.

10827.
Jul. 2, 1919.

COMPLAINT.

L. PALMER,
Attorney for Complainant,
606 Commercial Place, New Orleans, La.

31 Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
FERNWOOD & GULF RAILROAD COMPANY,
Walker D. Hines, Director General.

And the following-named carriers, designated, respectively, as "controlled lines" and "noncontrolled lines":

CONTROLLED LINES.

Illinois Central Railroad Company; The Yazoo & Mississippi Valley Railroad Company; New Orleans Great Northern Railroad Company; Gulf, Mobile & Northern Railroad Company; Mobile & Ohio Railroad Company; Southern Railway Company; New Orleans & Northeastern Railroad Company; Alabama Great Southern Railroad Company; The Alabama Northern Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; Alabama & Vicksburg Railway Company; The Atchison, Topeka & Santa Fe Railway Company; Atlantic City Railroad Company; Ann Arbor Railroad Company; Ashland Coal & Iron Railway Company; Atlantic Coast Line Railroad Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railroad Company; Bessemer & Lake Erie Railroad Company; Boston & Albany Railroad Company; The New York Central Railroad Company, lessee; Boston & Maine Railroad and J. H. Hustis, temporary receiver; Buffalo & Susquehanna Railroad Corporation; Buffalo, Rochester & Pittsburgh Railway Company; Central Indiana Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Rail-
32 way Company; The Chesapeake & Ohio Railway Company; The Chesapeake & Ohio Railway Company of Indiana; The Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railroad Company and Thomas D. Heed, receiver; Chicago & North

Western Railway Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Kalamazoo & Saginaw Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Gary Railway Company; Chicago, Peoria & St. Louis Railrod Company and Beuford Wilson and Wm. Cotter, receivers; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Chicago, Rock Island & Pacific Railway Company; The Cincinnati, Lebanon & Northern Railway Company; The Cincinnati Northern Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Coal & Coke Railway Company; Cumberland & Pennsylvania Railroad Company; The Cumberland Valley Railroad Company; The Cincinnati, Indianapolis & Western Railroad Company; Chicago, Burlington & Quincy Railroad Company; The Delaware & Hudson Company; The Delaware, Lackawanna & Western Railroad Company; Detroit & Toledo Shore Line Railroad Company; Detroit, Toledo & Ironton Railroad Company; Duluth, South Shore & Atlantic Railway Company; Detroit & Mackinac Railway Company; Detroit, Bay City & Western Railroad Company; Elgin, Joliet & Eastern Railway Company; Erie Railroad Company; Evansville & Indianapolis Railroad; Fort Dodge, Des Moines & Southern Railroad Company; The Gettysburg & Harrisburg Railway Company; Grand Trunk Western Railway Company; Grand Rapids & Indiana Railway Company; The Great Northern Railway Company; Greenwich & Johnsonville Railway Company; The Hocking Valley Railway Company; Indiana Harbor Belt Railroad Company; The Interstate Railroad Company; The Kanawha & Michigan Railway Company; Kewaunee, Green Bay & Western Railroad Company; Kentucky & Indiana Terminal Railroad Company; The Lake Erie & Western Railroad Company; The Lehigh & Hudson River Railway Company; Lehigh & New England Railroad Company; Lehigh Valley Railroad Company; The Long Island Railroad Company; Little Kanawha Railroad Company; Louisville & Nashville Railroad Company; Louisville, Henderson & St. Louis Railway Company; Litchfield & Madison Railway
33 Company; The Lorain, Ashland & Southern Railroad Company; Maine Central Railroad Company; Maryland, Delaware & Virginia Railway Company; The Michigan Central Railroad Company; Mineral Range Railroad Company; The Minneapolis & St. Louis Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri Pacific Railroad Company; The Monongahela Railway Company; Montpelier & Wells River Railroad; Nashville, Chattanooga & St. Louis Railway Company; New Jersey & New York Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Philadelphia & Norfolk Railroad Company; New York, Susque-

hanna & Western Railroad Company; Norfolk Southern Railway Company; Norfolk & Western Railway Company; The Northern Ohio Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; The Pennsylvania Railroad Company, Western Lines; Pere Marquette Railway Company; Philadelphia & Reading Railway Company; The Philadelphia, Newton & New York Railroad Company; The Pittsburgh & Lake Erie Railroad Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; Peoria Railway Terminal Company; Pontiac, Oxford & Northern Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; Rutland Railroad Company; St. Johnsbury & Lake Champlain Railroad Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Schoharie Valley Railway Company; Stony Creek Railroad Company; Susquehanna & New York Railroad Company; Seaboard Air Line Railway Company; Tennessee Central Railroad Company, and W. K. McAllister, receiver thereof; The Toledo & Ohio Central Railway Company; Toledo, Peoria & Western Railway Company, and E. N. Armstrong, receiver thereof; Toledo, St. Louis & Western Railroad Company, and W. L. Ross, receiver thereof; The Ulster & Delaware Railroad Company; The Virginian Railway Company; Wabash Railroad Company; Washington Southern Railway
34 Company; Waterloo, Cedar Falls & Northern Railway Company; Western Maryland Railway Company; West Jersey & Seashore Railroad Company; The Wheeling & Lake Erie Railway Company; The Zanesville & Western Railway Company.

NON-CONTROLLED LINES.

Arcade & Attica Railroad Corporation; The Akron, Canton & Youngsto'n Railway Company; Arcadia & Betsy River Railway Company; Bloomsburg & Sullivan Railroad Company; Boyne City, Gaylord & Alpena Railroad Company; Cadiz Railroad Company; Central West Virginia & Southern Railroad Company; Chesapeake Western Railway; Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Cornwall Railroad Company; Coudersport & Port Allegany Railroad Company; Dansville & Mount Morris Railroad Company, and A. S. Murray, receiver thereof; The Delaware Valley Railway Company; The East Jordan & Southern Railroad Company; Fonda, Johnstown & Gloversville Railroad Company; Genesee & Wyoming Railroad Company; Grafton & Upton Railroad Company; Ironton Railroad Company; Kalamazoo, Lake Shore & Chicago Railway Company; Louisville & Jeffersonville Bridge & Railroad Company; Manistee & Northeastern Railroad, and the Michigan Trust Company, receiver thereof; Marion & Rye Valley Railway Company; Maryland & Pennsylvania Railroad Company; Montour Railroad Company; Mount Jewett, Kinzua & Riterville Railroad Company; Morristown & Erie Railroad Company; New Jersey, Indiana & Illinois Railroad Company; New York &

Pennsylvania Railroad Company; The Pennsylvania & Atlantic Railroad Company (Union Transportation Company, lessee); The Pittsburgh, Shawmut & Northern Railroad Company, and F. S. Smith, receiver; The Pittsburgh, Lisbon & Western Railroad Company; Prattsburg Railway Corporation; Rahway Valley Railroad Company; Rapid Railroad Company; Raritan River Railroad Company; Reynoldsville & Falls Creek Railroad Company; St. Louis & Hannibal Railroad Company; The Tuckerton Railroad Company; Traverse City, Leelanau & Manistique Railroad Company;
35 Unadilla Valley Railway Company; Virginia Southern Railroad Company; The Wabash, Chester & Western Railroad Company, and J. Fred Gilster, receiver thereof; Western Allegheny Railroad Company; West Virginia Northern Railroad Company; Wharton & Northern Railroad Company; Williamsport & North Branch Railroad Company, and Edw. Bailey, receiver; The Youngstown & Ohio River Railroad Company, defendants.

Complaint.

To the honorable the Interstate Commerce Commission:

The complaint of the Swift Lumber Company, complainant, respectfully shows:

I.

That complainant is a corporation, organized under the laws of the State of Mississippi, and engaged in the business of manufacturing lumber, with its principal office and place of business at Knoxo, Miss., a station on the line of the Fernwood & Gulf Railroad Company.

II.

That the defendant, Walker D. Hines, is the duly appointed and acting Director General of the United States Railroad Administration, acting for and on behalf of the President of the United States in the control and management of the railroad lines of the several railroad companies above named and referred to as "controlled lines," under and by virtue of the authority vested in the President by act of Congress approved March 21, 1918. That said "controlled line" railroad companies as so operated, which complainant asks
36 be considered as formal parties defendant hereto, and said director general as operating same, are engaged in business as common carriers of passengers and freight for hire, solely by railroad, between points in the State of Mississippi and points in various other States; and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 8, 1887, and acts supplementary thereto and amendatory thereof.

III.

That the Fernwood & Gulf Railroad Company and the railroad companies above named, designated as "noncontrolled lines," are

each common carriers engaged in the transportation of passengers and property for hire, wholly by railroad, in interstate commerce, and particularly between points in the State of Mississippi and points in various other States; and as such are subject to the act to regulate commerce, approved February 8, 1887, and acts supplementary thereto and amendatory thereof.

IV.

That the said defendants above named publish, maintain, charge, and collect unreasonable, unjust, excessive, and unduly discriminatory rates for the transportation of yellow pine lumber, timber, and other sawmill products (carloads) from said station of Knoxo, Miss., to interstate points, and more particularly to points in the States of Louisiana, Tennessee, Kentucky, Virginia, Maryland, Delaware, New Jersey, New York, Massachusetts, Connecticut, Rhode Island, Maine, New Hampshire, Vermont, Pennsylvania, West Virginia, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Iowa, and Missouri and the District of Columbia, in this, that in the general adjustment of rates on yellow pine lumber from the territory adjacent to said station of Knoxo, Miss., to points in the said States named, the same rates apply from all points, with the exception of Knoxo and a few other points, within a territory or group extending from the Gulf of Mexico on the south to
37 Jackson, Miss., and the line of the Alabama & Vicksburg Railroad and beyond on the north, a distance of about 200 miles, and from the Mississippi River on the west to the main line of the Mobile & Ohio Railroad on the east, a distance of approximately 200 miles. That said station of Knoxo, Miss., where complainant's sawmill is located, is situated on the Fernwood & Gulf Railroad, 6 miles east of Tylertown, Miss., the junction of said Fernwood & Gulf Railroad with the New Orleans Great Northern Railroad, and 27 miles from Fernwood, Miss., junction with the Illinois Central Railroad; and rates from said station of Knoxo are uniformly 2 cents per 100 pounds higher than from said stations of Tylertown and Fernwood, which are the same as from all other points in the group above described, except to certain destinations, where through rates are in effect from Tylertown and Fernwood, but none are in effect from Knoxo. Complainant shows that the relation of yellow pine lumber rates from Knoxo to rates from other points in said territory obtains as to a very large number of destinations, comprising the principal markets for such lumber, which destinations are too numerous to set out or describe in detail herein; but there is attached hereto, marked Exhibit A and made a part hereof, an analysis of the rates in effect to some of the principal points and territories of destination illustrative of the situation as a whole.

Complainant shows that said group rates apply from points of origin involving materially longer hauls than from Knoxo, and that such rates are reasonable maximum rates to apply from Knoxo,

and that the existing rates from Knoxo are unreasonable, unjust, excessive, and unlawful to the extent that they exceed such reasonable maximum rates.

V.

Complainant shows that the said adjustment, above described, of rates on yellow pine lumber from Knoxo, Miss., is unduly dis-
38 criminatory against said station of Knoxo and against complainant, and unduly favors competing sawmills and points located on the rails of the above-named connections of said Fernwood & Gulf Railroad and on the rails of other carriers similarly situated to said Fernwood & Gulf Railroad. In further explanation of its allegation of discrimination, complainant shows that the Fernwood & Gulf is what is known as a short line, or tap line, built and owned by persons primarily engaged in the manufacture of yellow pine lumber, and extends in a general east and west direction to a junction with its two connections above named, which, like other lines leading from said territory to the markets, extend in a general north and south direction. That within the territory above described there are other short lines, or tap lines, owned under a community of interest with lumber manufacturing companies which are accorded from their local stations the same rates to the market territories in the States above named as apply from the junctions with their trunk-line connections. In specific illustration of such discrimination, complainant has incorporated in its Exhibit A, above referred to, a statement of the relationship of the group rates therein set forth with those from points on the said Fernwood & Gulf Railroad and from points on the Mississippi Central Railroad. Complainant shows that the transportation and traffic conditions surrounding the shipment from points on said Mississippi Central are substantially the same as from the Fernwood & Gulf Railroad, in that the Mississippi Central is also owned and controlled by persons primarily engaged in the manufacture of yellow pine lumber; that it is an east and west line, and depends upon its north and south connections to reach the lumber markets, and is located in close proximity to the Fernwood & Gulf. Complainant shows that it is what is known as an independent sawmill operator, and has no connection with the lumber interests which control said Fernwood & Gulf Railroad.

That the group or trunk line basis of rates to many of the
39 destinations above described applies from points on other short lines within the territory described, particularly from points on the Alabama & Mississippi Railroad, the Mississippi & Western Railroad, the Cybur, Gulf & Northwestern Railroad and the Pearl River Valley Railroad, in connection with their trunk line connections, which participate in the rates from points on the Fernwood & Gulf Railroad; and that the assessment of rates from Knoxo on the basis of said 2-cent arbitrary higher than such group rates unduly discriminates against complainant and unduly favors its competitors located on the rails of the trunk lines and other short lines in said adjacent territory.

VI.

Complainant shows that by reason of the facts above set forth it has been and is subjected to the payment, on its shipments of yellow pine lumber, timber, and other products of said mill, from said station of Knoxo, Miss., to interstate destinations, rates which were when exacted and still are unreasonable, unjust, and excessive, in violation of section 1; unduly discriminatory against complainant, in violation of section 2, and unduly preferential to other shippers and localities, in violation of section 3, of the act to regulate commerce.

VII.

Complainant shows that during the period of two years last past it has been and is continuing to make shipments of its products to interstate points on which it has been and is being charged the aforesaid unreasonable, unjust, excessive, discriminatory, and preferential rates. That complainant's product is similar and identical in character with that of other yellow pine mills in the territory above described, and it competes with such other mills in all the market territory above described. That with the exception of one other small sawmill the mill of complainant is the only yellow pine sawmill in all such territory whose products are charged in excess of the uniform group or blanket rates applying from said territory of origin to the several destinations above described, and that it is obliged to sell its product in such markets in competition with practically the entire output of yellow pine in the originating group described at prices which are influenced by the competition of such other mills among themselves and the rates of freight which they are charged to such markets; and that complainant has suffered and is suffering losses by reason of and to the extent of the greater rates which it is compelled to pay on its shipments over those paid by its said competitors. Complainant shows that by reason of the fact that such discrimination is a continuing one it is unable to make complete statement of its losses by reason thereof, but prays that it be permitted to make proof of such loss on the hearing hereof, and of the amount of such loss thereafter, and that it be awarded reparation therefor in such sum as may be found due to it.

Wherefore complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding the said defendants and each of them to cease and desist from the aforesaid violations of the act to regulate commerce, and establish and put in force and apply in future to the transportation of yellow pine lumber and timber between the origin and destination points named in Paragraph IV hereof, in lieu of the rates named in said paragraph, such other maximum rates as the commission may deem reasonable and just; and also to pay to complainant by way of reparation for the unlawful charges hereinbefore alleged such sum as, in view of the evidence to be adduced herein, the commission shall determine that

complainant is entitled to as an award of damages under the provisions of said act for violation thereof; and that such
41 other and further order or orders be made as the commission may consider proper in the premises.

SWIFT LUMBER COMPANY,
Complainant.

(Signed) By L. PALMER, *Attorney.*

Exhibit A to Exhibit A to bill.

Rates on yellow pine lumber and timber, carloads, to various representative points published in tariffs named, applying from stations on the Illinois Central, Yazoo & Mississippi Valley, and New Orleans Great Northern Railroads, and specifically, when not otherwise stated, from Fernwood, Brookhaven, and Tylertown, Miss.

Except where otherwise stated, rates as below from points above described apply also from local stations on the Mississippi Central Railroad; and rates from Knoxo, Miss., and other stations on the Fernwood & Gulf Railroad are 2 cents higher. Rates in cents per 100 pounds.

F. L. Speiden's Freight Tariff No. 22, I. C. C. No. 193 (Mississippi Valley-Ohio River Lumber Tariff).

To St. Louis, Mo.; Henderson, Ky.; Owensboro, Ky.; Louisville, Ky., 24.

To Cairo, Mounds, Mound City, Brookport, and Metropolis, Ill., 19; from Knoxo, 21.5.

To East Cairo and Paducah, Ky., 17.5; from Knoxo, 20.

To Evansville, Jeffersonville, and New Albany, Ind., 25.

To Cincinnati, O., 26.5.

To Groups Nos. 1 to 41, various rates.

M. P. Washburn's (F. L. Speiden's) Mississippi Valley-Middle States Lumber Tariff No. 2, I. C. C. No. 159, as amended.

To Vincennes, Ind., 28.5.

To Chicago, Peoria, Danville, and Springfield, Ill., 30.5.

To Indianapolis, Ind.; Rockford, Ill.; Moline, Ill., 31.5.

To Dayton, O., 32.

42 To Kokomo, Ind.; Richmond, Ind.; Milwaukee, Wis.; Madison, Wis., 32.5.

To South Bend, Ind., 33.5.

To Fort Wayne, Ind., 34.5.

To Toledo, O.; Columbus, O.; Lima, O.; Kalamazoo, Mich.; Grand Rapids, Mich.; Detroit, Mich., 35.5.

To Charleston and Huntington, W. Va., 36.5.

To Akron, O.; Cleveland, O.; Saginaw, Mich., 37.

To Buffalo, N. Y.; Pittsburgh, Pa.; Parkersburg, W. Va.; Youngstown, O., 38.

To Cadillac, Mich., 39.

To Grafton, W. Va., 40.

Illinois Central Tariff 664–D, I. C. C. No. 5577, in connection with Star Union Line Basis for Freight Rates Eastbound, F. E. Shallenberger's No. 2, I. C. C. No. 4.

To Richmond, Va., and points taking same rates, 29.

To Washington, D. C., 32.5.

To Baltimore, Md., and points taking same rates, 36.

To Philadelphia, Pa., and points taking same rates, 37.

To Rochester, N. Y., and points taking same rates, 38.5.

To New York, Albany, Syracuse, Utica, and Troy, N. Y., and points taking same rates, 39.

To Boston, Mass., and points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut taking same rates, 43.

Illinois Central Tariff 506–A, I. C. C. 3996, as amended.

To Ashland, Wis., 36.

To Eau Claire, Wis., and Minneapolis, Minn., 36.

To Duluth, Minn., 39.

To Escanaba, Mich., 38.5.

To Ishpeming, Mich., 39.5.

To Albert Lea, Minn.; Iowa Falls, Ia., 37.

To Winona, Minn., 34.5; from Knoxo, no through rates.

To Sioux City, Ia., 35.

To Des Moines and Council Bluffs, Ia., 31.5; from Knoxo, no through rates.

To Dubuque, Ia., 30.5; from Knoxo, no through rates.

43 To Davenport, Ia.; Burlington, Ia., 29; from Knoxo, no through rates.

To Kansas City, St. Joseph, and Jefferson City, Mo., 29; from Knoxo, no through rates.

To Hannibal, Mo., 27; from Knoxo, no through rates.

Illinois Central Tariff 662–B, I. C. C. 5259, as amended.

Rates in this tariff apply from stations on the Illinois Central, specifically from Fernwood and Brookhaven, Miss., and, except as stated, from stations on the Mississippi Central Railroad. Rates do not apply from Knoxo, Miss., or other stations on the Fernwood & Gulf Railroad.

To stations on the Louisville, Henderson & St. Louis Railroad, from 28 to 32 cents.

To various points on the Kentucky division and branches of the Louisville & Nashville Railroad in Kentucky and Tennessee, from 24 to 33 cents.

To Chesapeake & Ohio stations in Kentucky—Mitchell, 27; Moscow, 20; Mount Sterling, 35.

To stations on Tennessee Central Railroad, 25.

To Coalburg, Ala., 25; Florence, Ala., 20; Huntsville, Ala., 20.

To Allen, N. C., and points on Norfolk & Southern Railroad taking same rates, 32. Do not apply from stations on the Mississippi Central.

To High Point, N. C., and points on Southern Railway taking same rates, 31. Do not apply from stations on the Mississippi Central.

Illinois Central Tariff 510–C, I. C. C. 4891, as amended.

To Memphis, from Fernwood (index No. 53, page 54), 14 cents; from Brookhaven (index No. 77, page 56), 14 cents.

Item 174, to Memphis, from Fernwood and Gulf points, including Knoxo, 16.5.

Note. From Mississippi Central points, 1 cent higher than Brookhaven, equals 15 cents to Memphis.

44 *Exhibit B–1 to bill of complaint.*

Filed Aug. 29, 1919.

Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT, vs. FERNWOOD & GULF RAILROAD COMPANY, Walker D. Hines, Director General, et al., defendants.	DOCKET NO. 10827.

ANSWER OF THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

Comes now the defendant, The Minneapolis & St. Louis Railroad Company, and answering the complaint of the complainant herein and its claim for reparation, denies each and every matter and thing stated and contained in said complaint.

Wherefore this defendant prays that the complaint of the complainant may be dismissed and for such other relief as to the commission may seem proper in the premises.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

(Signed) By W. C. KNOBLE, *Corporate Auditor.*

45 *Exhibit B–2 to bill of complaint.*

Filed Aug. 29, 1919.

Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT, vs. FERNWOOD & GULF RAILROAD COMPANY, Walker D. Hines, Director General, et al., defendants.	I. C. C. Docket No. 10827.

The Bloomsburg & Sullivan Railroad Company, one of the defendants named in the above proceedings, for its answer of the petition therein filed, respectively states:

1. This defendant admits that it is a common carrier and to a very limited extent engaged with its connections in the transportation of property between certain States, either by continuous carriage wholly by rail or partly by rail and partly by steamship, and that as such common carrier and in respect of such interstate transportation it is

subject to the provisions of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof or supplementary thereto, in so far as such provisions are constitutional and legal.

2. This company admits that it is a party to the tariffs of which the above petition refers to by concurrences given connecting lines, they holding our power of attorney for that purpose, and this defendant has not sufficient information to admit or deny the averments contained in the above docket.

3. Whereof this defendant prays that the petition as to it be dismissed.

BLOOMSBURG & SULLIVAN RAILROAD COMPANY.
(Signed) By its W. C. SNYDER, *Superintendent.*

BLOOMSBURG, PA., *August 27, 1919.*

46 COUNSEL.

STATE OF PENNSYLVANIA,
County of Columbia, ss:

W. S. Snyder, having been duly sworn, says that he is the superintendent of the Bloomsburg & Sullivan Railroad Company, the defendant above named and answering, and that the facts set forth in the foregoing answer are true, as he verily believes.

Sworn to and subscribed before me this twenty-seventh day of August, 1919.

[SEAL.] (Signed) FRANK P. ZARR,
Notary Public.

My commission expires March 9, 1923.

47 *Exhibit B–3 to bill of complaint.*

Before the Interstate Commerce Commission.

Filed Sep. 15, 1919.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ET AL., DEFENDANT.
} I. C. C. Docket No. 10827.

The answer of Walker D. Hines, Director General of Railroads, answering for himself and on behalf of all the defendants under Federal control to the complaint.

For answer to the complaint, or so much thereof as he is advised it is necessary for him to answer, this defendant says:

1. He admits that he is Director General of Railroads, and as such is exercising the powers vested in and duties assigned him.

2. He refers to the tariffs named in the complaint and to all other tariffs applicable for a correct statement of the rates referred to or complained of herein.

3. He says that there was made the director general's order No. 28, effective June 25, 1918, and he avers it is therein by him found and

certified to this honorable commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit, it was necessary to increase the railway operating revenue; also that in his opinion the public interest required a general advance in freight rates, passenger fares, and baggage charges as therein provided; and he further avers that all rates as now in force and complained of herein have been established pursuant to and in accordance with said order.

4. He denies that he or any of the defendants under Federal control has violated or is violating sections 1, 2, or 3 of the act to regulate commerce, as alleged in the complaint, or that anything done or omitted by him or any of them, with respect to the subject matter of the said complaint, is in violation of law, or that he or any of them should be subjected to any adverse order; and he denied that the complainant is entitled to the relief prayed, or any other relief.

And having fully answered, he prays that the complaint may be dismissed.

WALKER D. HINES,
Director General of Railroads.
(Signed) By R. V. FLETCHER,
Assistant General Counsel,
United States Railroad Administration.

WASHINGTON, D. C., *September 13, 1919.*

48 *Exhibit B–4 to bill of complaint.*

Filed Oct. 29, 1919.

Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
FERNWOOD & GULF RAILROAD COMPANY ET AL. } No. 10827.

ANSWER OF FERNWOOD & GULF RAILROAD COMPANY.

GREEN & GREEN, *Attorneys.*

49 Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
FERNWOOD & GULF RAILROAD COMPANY ET AL.,
Walker D. Hines, Director General.

ANSWER OF FERNWOOD & GULF RAILROAD COMPANY.

Now comes Fernwood & Gulf Railroad Company, a corporation duly chartered, organized, and existing under and by virtue of the

laws of the State of Mississippi, having its residence and legal domicile in the State of Mississippi, and for answer unto said petition, says:

I.

This respondent admits the allegations of Paragraph I.

The respondent admits the allegations of Paragraph II of the petition.

50

III.

This respondent admits the allegations of Paragraph III.

IV.

This respondent denies that either individually or in conjunction with others it either publishes, maintains, charges, and/or collects either unreasonable, unjust, excessive and/or unduly discriminatory rates for the transportation of yellow pine lumber, timber, and other sawmill products (from the station of Knoxo, Miss.) to interstate points more particularly alleged in said petition, or to any other point.

Respondent denies that individually or in connection with any of the other defendants to said petition it has in any way published, maintained, charged, or collected any rate that is in contravention of the act to regulate commerce with its several amendments.

Respondent denies that in the general adjustment of rates on yellow pine lumber from the territory adjacent to the station of Knoxo, Mississippi, to the points in the said States named, or to any other point, that the same rates apply from all points with the exception of Knoxo and a few other points within a territory or group extending from the Gulf of Mexico on the south to Jackson, Miss., and the line of the Alabama and Vicksburg Railroad and beyond on the north, a distance of about two hundred miles, and from the Mississippi River on the west to the main line of the Mobile and Ohio on the east, a distance of approximately two hundred miles. Respondent denies

51 that any respondent to this petition, either jointly or severally, has ever published, maintained, and/or collected a blanket rate from points similarly situated to said Knoxo in this, that said Knoxo is located upon the line of the Fernwood and Gulf Railroad, six miles east of Tylertown, Miss., and twenty-seven miles from Fernwood, Mississippi, the junction point with the Illinois Central Railroad. Respondent admits that the rates from said Knoxo are uniformly two cents per hundred pounds higher than from the stations of Tylertown and Fernwood. The reason therefor is that from said Tylertown the New Orleans Great Northern Railroad extends southwardly to a junction with its main line at Rio, and in order for this respondent to move any tonnage therefrom it must meet competition, irrespective of whether or not by so doing it earns a reasonable return upon its property charged with railroad duties; that from said Fernwood, Miss., the movement is over the

main line of the Illinois Central Railroad and not on an independent short line carrier. Respondent denies that the said Illinois Central Railroad has ever pursued a policy of allowing stations upon the branch lines independently owned and operated to enjoy the same rates as points upon its main line. Respondent denies that said group rates apply from such points of origin as make the rate from Knoxo unreasonable, unjust, excessive, and/or unlawful either to the extent that they exceed such alleged reasonable rates of to any other extent.

Respondent denies that the adjustment of rates whereby the rate from Knoxo is two cents higher than from any other point mentioned is unjust, or discriminatory against the station of Knoxo, or against the complainant, and denies that it unduly favors competing sawmills and points located on the rails of the above-named con-
52 nections of the said Fernwood and Gulf Railroad, or on the rails of other carriers similarly situated.

Respondent denies that it is a tap line and avers that by order dated December 21, 1914, upon investigation duly had it was dismissed from the tap line case, I. & S. Docket No. 11, as appears by Exhibit A hereto annexed and made a part hereof. Respondent avers that its stock is owned by F. B. Enochs and that its bonds have been distributed in the markets of the world. Respondent admits that its line runs in a general east and west direction to a junction with the Illinois Central at Fernwood and the New Orleans Great Northern at Tylertown, which are north and south trunk lines. Respondent is without information or belief as to whether there are within said territory other short-line railroads owned under a community of interest with the manufacturing companies which are accorded from their local stations the same rate to the markets in the States above named as apply from the junction with their trunk-line connections, and upon such want of information and belief denies this allegation.

Respondent denies that the Mississippi Central Railroad is in any sense a tap line, but avers that said line has been taken over by the United States R. R. Administration and is now operated by the director general, and extends from Natchez, Miss., where it connects with the Mississippi River and with the Missouri Pacific and Yazoo and Mississippi Valley, which roads extend to the territory made the basis of such complaint, and from said Natchez tonnage so originating along the line of said Mississippi Central Railroad could move either by rail or water under rates wherein the Mississippi Central Railroad could demand and receive such divisions as would make their operation profitable.

53 That said Mississippi Central Railroad crosses the main line of the Yazoo and Mississippi Valley Railroad at Roxie, Miss. Said Mississippi Central then crosses the main line of the Illinois Central Railroad at Brookhaven, Miss., at which point it also joins a line of the Illinois Central extending east to Monticello, at which point it connects with the New Orleans Great Northern R. R.

Respondent avers further that at Montrose said Mississippi Central Railroad crosses the New Orleans Great Northern and also crosses the Pearl River, which at that point is a navigable stream and wherefore governmental appropriations are made; that said Mississippi Central then crosses the Gulf and Ship Island Railroad at Silver Creek and then extends into Hattiesburg, Miss., where it joins the New Orleans and North Eastern division of the Southern Railroad, the main line of the Gulf and Ship Island Railroad, and the Gulf, Mobile and Northern, and that the said Mississippi Central Railroad has six independent systems of trunk lines with which it is connected and over which it can move its tonnage and from which it can exact therefor divisions, and in addition has water connections both at Natchez and Wanilla that are essential if not actually utilized, and therefore respondent denies that transportation and traffic conditions surrounding the shipment from points on said Mississippi Central Railroad are substantially the same as from points upon the said Fernwood and Gulf Railroad, and denies upon information and belief that said Mississippi Central Railroad is owned and controlled by persons primarily engaged in the manufacture of yellow pine lumber. Respondent admits that the Mississippi Central is an east and west line and dependent upon its north and south connections to reach the lumber market and denies that it is located in proximity to the Fernwood and Gulf Railroad.

54 Respondent admits that complainant is an independent sawmill operator and that he has no connection with the Fernwood and Gulf Railroad, and denies that any lumber interest controls the Fernwood and Gulf Railroad.

Respondent denies that the group or trunk line basis of rates to many of the destinations above described apply from points on other short lines within the territory described in so far as any of the connections of the New Orleans Great Northern or the Illinois Central Railroads are concerned, and denies that either of said trunk lines have ever pursued a policy of affording a rate from stations upon independently operated short-line railroads the same as afforded the main-line stations.

Respondent denies that the Alabama and Mississippi Railroad connects with either the New Orleans Great Northern or the Illinois Central, but, on the contrary, runs from Evanston on the Gulf, Mobile and Northern to Vinegar Bend, Ala. Respondent shows the Mississippi and Western Railroad connects with the Gulf, Mobile and Northern at Stevens, and runs in an easterly direction towards the Southern Railroad. The Cybur, Gulf and Northwestern Railroad, which has been consolidated in some way to respondent unknown with the said Pearl River Valley Railroad, runs from Picayune, Miss., northward to Cybur, approximately fifteen miles, having its junction with the Southern Railroad, but the trunk-line connections of each and all of the aforesaid short lines are different from the trunk-line connections with which this respondent connects, and there is no movement whatsoever over or crossing the line of this

respondent of any freight arising on said Alabama and Mississippi Railroad, said Mississippi and Western, said Cybur, Gulf
55 and Northern Railroad, or said Pearl River Valley Railroad.

That said Alabama and Mississippi Railroad starts at Pascagoula, on the Gulf of Mexico, where it connects with the Louisville & Nashville Railroad, and runs thence northwards to Evanston, where it connects with the Gulf, Mobile and Northern, and thence northward to a connection with the Mobile and Ohio Railroad at Vinegar Bend, Ala., and that the policy of said Mobile and Ohio and the policy of the said other trunk lines has been and is different from that obtaining in the territory wherein said petitioner's mill is located; and respondent denies that there ever was in said territory wherein said plaintiff's mill is located a policy to give a blanket rate through to the points mentioned in said petition, and respondent denies that the assessment of rate from Knoxo, Miss., of two cents higher than from the main-line points unduly discriminates against the complainant or unduly favors its competitors located upon the rails of trunk lines and on short lines in said adjacent territory.

VI.

Respondent denies that by reason of any facts set forth in the petition or any other facts said complainant is subjected to a payment of rates which are now or ever have been unreasonable, unjust and/or excessive or in violation of section one of the said act to regulate commerce, or unduly discriminates against complainant in violation of section two, or unduly preferential to other shippers or localities in violation of section three of said act to regulate commerce.

Respondent avers that its said line is a public carrier for hire and its capitalization has been approved by this honorable com-
56 mission through its valuation department, and also this respondent does not receive now in the operation of its road adequate revenue for the purpose of properly serving the public.

Respondent avers that its road was constructed for the moving to market timber owned by said complainant and others and after being utilized for that purpose will become without value and have to be junked, and that in addition to a reasonable return upon its investment respondent is entitled to set aside a reserve which when lumber operations are completed will vouchsafe to those who have invested in its securities a return of capital commensurate with the original investment; and that this respondent is entitled to assess against each of the parties utilizing the public facilities for transporting lumber to markets tributary to its line an adequate depreciation charge so as to vouchsafe said capital return, but that instead of so having said capital return vouchsafed if said rates are reduced the result will be to cause at once an impairment of this respondent's financial condition to such extent that receivership will be inevitable and dismemberment only a question of a short time,

as has been actually the case with the eastern end of the Liberty-White Railroad, which lies between said Mississippi Central and said Fernwood and Gulf Railroads. Respondent avers that if said road was constructed for the purpose of serving the public by bringing to market timber adjacent to its line and that without its said line being so constructed said timber was not available and said timber thus made available is assessable with a reasonable return upon the capital investment to vouchsafe a capital return at the end of the operating period.

57 VII.

Respondent denies that it has ever collected from said complainant any rates which are unreasonable, unjust, excessive, discriminatory, and/or preferential. Respondent denies that complainant's part is similar and identical in character with that of other yellow pine mills in the territory above described and admits that it competes with other mills in the market territories above described, but shows to the commission that the rates here complained of have been in effect for many years and that complainant was advised of its existence at the date of the establishment of his mill and acquiesced in said rate as being a proper rate, and respondent avers that the additional charge necessary to haul said lumber to the main trunk lines found expression in the price which the said complainant paid for his lands, timber, and rights of way in this, that it was less than timber of the same kind and character was selling for on the main trunk lines, where such timber could move upon said trunk line rates. Respondent further denies that said complainant is the only one charged a rate in excess of the alleged blanket rate, alleged to exist but which does not exist in fact, and denies that it is obliged to sell its product in such markets in competition with practically the entire output of yellow pine points in the originating group described, and respondent avers that the prices are controlled largely by stumpage values and that the stumpage value existing at points as remote as Knoxo are lower than the said values at main line points, and avers that main line points producing lumber have to take into consideration the difference in the cost of raw material, which respondent avers more than offsets any alleged discrimination arising by reason of said rates. Re-
58 spondent denies that complainant has suffered and is suffering any loss by reason and to the extent of any alleged greater rate which it is compelled to pay on its shipments over those places by its competitors. Respondent denies that there is a discrimination which is continuing and denies that said complainant is unable to make a statement thereof.

Unto the supplemental petition this respondent neither admits nor denies the correctness of the statement appended, but if an order for reparation is made will comply with the rule in that behalf existing. Respondent denies that said alleged rates are unreasonable and discriminatory. Respondent denies that said complainant was in-

jured by the collection of said rates. Respondent denies that said lumber so shipped was sold by complainant delivered at destination and denies that the charges assessed thereon were paid for on account and borne by it. He denies that it has been damaged as therein alleged or in any other sum.

2. Respondent denies that said rates were not reasonable and denies that said complainant has been damaged by any discrimination in the manner set forth in said petition or to any extent whatever, and denies specifically each of the allegations as they are set forth in full as hereinbefore alleged.

3. Respondent is without information as to whether or not said lumber so shipped under said Exhibit B was sold f. o. b. said mill at Knoxo, but if the order of reparation is made this respondent will submit proper lists for checking in accordance with the rules, but denies, however, that said complainant is in any way entitled to any damages or compensation by reason thereof. Respondent de-
59 nies that it sells its product in actual competition with other mills, and avers that during the time mentioned that it could have gotten any price it desired almost for the output of its said mill; that the question was not one of price but of obtaining lumber; and denies that there was any discrimination of any kind or character which damaged the said complainant in any way or to any extent. Respondent denies that the said complainant can collect damages in any way for lumber sold f. o. b. its mill. Respondent denies that during any of said period save the time after filing of this formal complaint that said petitioner made any complaint of the said movement, and said rate was acquiesced therein, and that the amount received therefor has been in good faith by this respondent expended and disbursed for the public welfare, and denies that any order of reparation therefor can be awarded.

And now, having fully answered, respondent prays that it be discharged with its reasonable costs and expenses.

FERNWOOD & GULF RAILROAD COMPANY.
GREEN & GREEN, *Attorneys.*

STATE OF MISSISSIPPI,
County of Hinds, city of Jackson:

Personally appeared before me, the undersigned notary public, the within-named Garner W. Green, who, having been by me first duly sworn, on oath states that he is one of the attorneys for the Fernwood & Gulf Railroad Company, and that upon the 27th day of October, 1919, he sent under registered cover the copy of the answer of the Fernwood & Gulf Railroad Company to the Hon. L. Palmer, attorney for plaintiff, 606 Commercial Place, New Orleans, La.

(Signed) GARNER W. GREEN.

Sworn to and subscribed before me this the 27th day of October, 1919.

[SEAL.] (Signed) O. J. WAITE,
Notary Public.

60 *Exhibit C to bill of complaint.*

Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
FERNWOOD & GULF RAILROAD COMPANY, DIRECTOR General, et al., defendants. } Docket No. 10827.

CHICAGO, ILL., *Dec. 18, 19, 1919.*

61 Before the Interstate Commerce Commission.

SWIFT LUMBER COMPANY, COMPLAINANT,
vs.
FERNWOOD & GULF RAILROAD COMPANY, DIRECTOR General, et al., defendants. } Docket No. 10827.

CHICAGO, ILLINOIS, *December 8, 1919—10.00 a. m.*

Before J. Edgar Smith, special examiner.

Met pursuant to notice.

Appearances:

L. Palmer, 606 Commercial Place, New Orleans, Louisiana, appearing for complainant.

A. P. Humburg and J. L. Sheppard, 135 East 11th Place, Chicago, Illinois, appearing for defendants under Federal control.

Green & Green, Jackson, Mississippi, appearing for Fernwood & Gulf Railroad Company.

George B. Auburtin, 727 Gravier Street, New Orleans, La., appearing for New Orleans Great Northern Railroad Company.

64 PROCEEDINGS.

Exam. SMITH. Gentlemen, the Interstate Commerce Commission has set for hearing at this time and place the complaint of Swift Lumber Company vs. Fernwood & Gulf Railroad Company, Director General, et al. This case is known on the docket as 10827, and was filed July 2, 1919.

I see present Mr. Palmer, representing the complainant; Mr. Humburg, representing the director general; Mr. Green, representing the Fernwood & Gulf; Mr. Arburtin, representing the New Orleans Great Northern Railroad Company.

Are there any other appearances?

(No response.)

Exam. SMITH. In this case it is alleged that rates on yellow-pine lumber, timber, and other sawmill products, in carloads, from Knoxo, Mississippi, a local situation on the Fernwood & Gulf Railroad, to numerous interstate destinations are unreasonable, unjustly discriminatory, and unduly prejudicial in that they exceed the rates

contemporaneously applied from the junction points between the Fernwood & Gulf and its trunk-line connections and from other points both on trunk lines and short lines in the so-called yellow-pine blanket. Reparation and the establishment of reasonable rates for the future are asked.

65 Mr. Palmer, is that statement substantially correct?

Mr. PALMER. I think so; yes.

Exam. SMITH. Are there any objections, gentlemen?

Mr. HUMBURG. I think that is a fair summary, Mr. Examiner.

Exam. SMITH. You may proceed, Mr. Palmer.

Mr. PALMER. I will have Mr. Kimball sworn. You might swear me and Mr. Kimball also, as I will have some statements to make as I go along.

(The oath was administered to Mr. Palmer and Mr. Kimball.)

Mr. PALMER. Before I examine Mr. Kimball, I want to put in a few exhibits and there are some others that I will put in in connection with my examination of him. In the way of exhibits I will first refer to Exhibit A of our complaint and ask to have that considered in evidence. It is printed in the complaint.

Exam. SMITH. Exhibit A as printed and bound with the complaint is the exhibit you refer to?

Mr. PALMER. Yes. Now, elaborating on that, I offer as an exhibit a more detailed statement of the tariff references covering the rates involved in the complaint, showing the entries in the various tariffs which determine the relationship of rates from points on rails

66 of originating carriers.

(The document was thereupon received in evidence, marked "Complainant's Exhibit 1, Witness Palmer," and is forwarded herewith.)

Exam. SMITH. Mr. Palmer, before you proceed further, you drew and signed, as attorney, the complaint that is before the commission now?

Mr. PALMER. Yes, sir.

Exam. SMITH. The statements therein made are true to the best of your knowledge and belief?

Mr. PALMER. Yes, sir.

J. B. KIMBALL was called as a witness, and having been duly sworn, testified as follows:

Direct examination:

Q. (By Mr. PALMER.) Mr. Kimball, state your connection with the Swift Lumber Company, complainant in this case.

A. My name is J. B. Kimball, and I am secretary-treasurer of the Swift Lumber Company, a corporation organized under the laws of the State of Mississippi, on September 26, 1911. I am a stockholder and a director and have been since the organization of the company.

Q. What are your duties in that connection? What part of the business do you handle?

A. I have charge of the finances, the sales of lumber, and the accounting and the shipping.

67 Q. How long has the Swift Lumber Company been operating at Knoxo?

A. Since April, 1912.

Q. Knoxo is located on what line?

A. On the Fernwood & Gulf Railroad.

Q. How do your shipments move out from there, over what connections?

A. Over the Fernwood & Gulf, and the I. C., with occasional shipments moving by way of the Fernwood & Gulf-New Orleans Great Northern.

Q. How far is Knoxo from the junction of the I. C.?

A. Twenty-seven miles.

Q. That junction is at what point?

A. At Fernwood, Mississippi.

Q. How about the connection with the New Orleans Great Northern?

A. We are seven miles from Tylertown, which is the junction point of the Fernwood & Gulf Railroad with the New Orleans Great Northern Railroad.

Q. What is the nature of the Swift Lumber Company's business?

A. We are sawing and manufacturing long leaf yellow pine timber and lumber.

Q. You have a planing mill?

A. We have a dry kiln and a planing mill.

68 Q. You manufacture a general line of yellow pine products?

A. Yes, sir; we manufacture a general line of yellow pine products, both rough and dressed.

Q. Is that a timber country down there?

A. That is a timbered country throughout that section of the State, and there are several sawmills besides ours in that part of the State.

Q. What is the character of their product as compared with yours?

A. It is practically the same class and kind of a product as ours, with the exception that there are one or two sawmills which are cutting hardwood instead of pine.

Q. What is the capacity of your mill?

A. About one million feet a month, or about 45,000 feet per day.

Q. Your shipments will run about how much in a month, how many cars?

A. Approximately one million feet, in that neighborhood.

Q. But I mean in cars. In that connection just look at this statement. I do not care to offer the statement in evidence, but it is just for the purpose of refreshing the witness' recollection. Is that a statement you made up of your shipments for the first half of this year?

A. It is.

Q. Is that a correct statement from your books?

69 A. This is a correct copy of our shipping book for the period mentioned.

Mr. PALMER. I will make the statement myself that from that I made up the little statement of the distribution of the shipments for that six months, showing the markets to which the shipments were made.

Mr. HUMBURG. May I ask, Mr. Palmer, if the statement which the witness now has in his hand, and to which you made reference, is the exhibit to your supplemental complaint, or is it a set of other shipments?

Mr. PALMER. No; it includes other shipments as well. I will offer this summary statement in evidence, I believe. It shows 27 cars to points in Tennessee and Kentucky; 69 cars to points on and north of the Ohio River; 31 cars to points in Mississippi; 35 cars to New Orleans for export.

(The document was thereupon marked "Complainant's Exhibit No. 2, Witness Kimball," and is forwarded herewith.)

Mr. PALMER. Right in that connection, I have filed a supplemental complaint and prayer for reparation, which was returned to me for the reason that I did not send enough copies to go around to all the defendants. At this time, in connection with this question of the distribution of the shipments and the markets in which the
70 complainant does business, I will ask to have that supplemental complaint filed as an exhibit, just for that purpose. So far we are getting a detailed list of the shipments on which we expect to claim reparation. It is not only for that purpose, that is, for the purpose of elaborating further on the general character of the business, but also is to be considered as proof of damage for the present.

Exam. SMITH. Is there objection to that, gentlemen?

Mr. PALMER. It is understood I am not filing this as a complaint now, but as a convenient form of an exhibit.

Mr. HUMBURG. As I understand it, it is not to be filed as a complaint?

Mr. PALMER. No.

Mr. HUMBURG. But as an exhibit to show the shipments made?

Mr. PALMER. Yes; I have it in that shape and it won't be any good hereafter for that particular purpose.

Exam. SMITH. That exhibit will be received.

(The document was thereupon received in evidence, marked "Complainant's Exhibit No. 3, Witness Kimball," and is forwarded herewith.)

Q. (By Mr. PALMER.) Mr. Kimball, you are continuing to make shipments now, are you?

A. We are.

71 Q. Since the period covered by this exhibit?

A. Yes, sir.

Q. Does this statement which I have filed here, this summary of your shipments, Exhibit 2, portray practically the general run of your business, as to your markets in which you sell?

A. It does under normal conditions.

Q. To all these markets, as alleged in the complaint, you have either no through rates to a few points or an arbitrary of 2 cents over the rate applying from the junction point?

A. Yes, sir.

Q. Explain to the examiner how that affects you in your business.

A. We sell our lumber to wholesalers and they give us their inquiries and we make quotations on their inquiries. We make them either a delivered price at a stated destination or we give them a price f. o. b. cars at our mill or a price f. o. b. cars main-line rate. In figuring our net prices on our output we necessarily must deduct the extra freight on the shipment caused by the existing two-cent arbitrary.

If we gave our wholesalers a price f. o. b. on the main-line rate, we make a reduction from our invoice of two cents per hun-
72 dred pounds, which protects them against the two-cent arbitrary rate. If we make a customer a price f. o. b. cars or f. o. b. mill, he has to take into consideration the existing arbitrary in making his delivered price to his customer he sells to.

In the past I have had considerable trouble and correspondence through misunderstanding about the two-cent arbitrary. I have made prices to wholesalers f. o. b. cars or mill, and when they made their final returns they deducted the two-cent arbitrary; and after having this matter called to their attention they refused to refund the extra freight charges and disrupted our business relations with them.

Q. So you have a two-cent arbitrary constantly brought home to you, in other words?

A. It always has to be taken into consideration. In writing letters to wholesalers or prospective customers who are not familiar with the conditions on our line, I make it a practice to call attention to the fact that we have a two-cent arbitrary over the main-line rate.

Q. How is the competition in that territory with other mills? In other words, what proportion of the other mills have the main-line rate as compared with you, and how many are there that are situated the same as you are, with an arbitrary, that you know of?

A. I don't know of my personal knowledge any other mill
73 except the one that is located on the Fernwood & Gulf Railroad at another station.

Q. What kind of a mill is it?

A. It is a small sawmill cutting hardwoods and short-leaf timber.

Q. In that connection I will offer a map of the territory from New Orleans up to Goodman, Mississippi, on the Illinois Central; Vicksburg, on the Yazoo & Mississippi Valley; Tollison, on the Gulf, Mobile & Northern; and Meridian, on the Mobile & Ohio and New Orleans & Northeastern; and extending from the Mississippi River to the main line of the Mobile & Ohio. I do not want anybody to think I consider this map a work of art at all, but it is accurate.

(The map was thereupon received in evidence, marked "Complainant's Exhibit No. 4, Witness Kimball," and is forwarded herewith.)

Mr. PALMER. That map I have marked with a cross on the location of all the sawmills I am able to locate, which according to the tariff and the Red Book, which is a standard lumber directory, are on the lines which take arbitraries over the main-line rates, and you will notice in about the center of the map a large cross marked "Knoxo," in capital letters, and close to it a small cross which repre-
74 sents the mill referred to by Mr. Kimball, and down at Madisonville, on the Kentwood & Eastern, just above Lake Pontchartrain, there is another cross, representing the Mississippi Valley saw and planing mill. Mr. Kimball says that small cross should be on the other side of Tylertown.

The WITNESS. It should be west of Tylertown.

Mr. PALMER. I will just let that correction be made in the record without disturbing the map.

Examiner SMITH. There is no necessity of disturbing the map. It is perfectly plain from the testimony where the competing mill referred to by Mr. Kimball is; it is west of Tylertown on the Fernwood & Gulf Railroad.

Mr. PALMER. Yes. Now, in my complaint I alleged there was only the complainant's mill and one other small mill, but upon looking it up further I discover there is another mill at Madisonville, which, by the way, has a 1-cent arbitrary as against our 2-cent arbitrary.

In that connection it is well to observe that the 2-cent arbitrary relates to the adjustment before General Order No. 28. Under that order the arbitraries are increased in some instances to 2½ cents. This map is based on the rate relationships set out in F. L. Speiden's Tariff I. C. C. No. 159, Mississippi Valley Maddle States
75 Lumber Tariff No. 2. As I stated, I located these mills by the Red Book.

I want now to ask Mr. Kimball in regard to these short lines.

Q. (By Mr. PALMER.) You know some of these short-line roads connecting with the Illinois Central?

The WITNESS. I do.

Q. Garyville Northern, do you know that road?

A. No; I do not.

Q. The New Orleans, Natalbany & Natchez, that is a lumber-owned road, is it not?

A. That is owned by the Natalbany interests, or controlled by them.

Q. How about the Loranger, Louisiana & Northeast?

A. That is controlled by the Genesse Lumber Company.

Q. The Kentwood & Eastern?

A. Controlled by the Brooks-Scanlon Company.

Q. Kentwood, Greensburg & Southwestern?

A. By the Amos-Kent Lumber and Brick Company.

Q. Liberty White?

A. It was controlled by the J. J. White Lumber Company.

Mr. HUMBURG. Is it out of existence now?

The WITNESS. They have moved their mill, and the railroad in question has been in the hands of a receiver for some time.

Q. (By Mr. PALMER.) The Fernwood & Gulf?

76 A. That is controlled by the Fernwood Lumber Company.

Q. Natchez, Columbus & Mobile?

A. By the Denkman Lumber Company.

Q. What is the character of the ownership of the Mississippi Central?

A. It is controlled by the J. J. Newman Lumber Company.

Q. They have mills on that line?

A. They have mills at Hattiesburg, Sumrall, and at Bude.

Q. That mill at Bude is not in the name of the Newman Lumber Company, is it?

A. No; that is in the name of the Central Lumber Company, I think.

Q. I haven't it here, but my impression is that the Homo-Chitto Lumber Company is the name of that company; that is a Newman company.

A. I understand that to be one of the Newman interests; yes, sir.

Q. How about the Central Lumber Company?

A. I understand that to be one of the J. J. Newman interests.

Q. Where are their mills; that is, the Central Lumber Company's mills?

A. They have a planing mill at Brookhaven, and their mills are located on the Mississippi Central Railroad.

Q. I am more familiar with that, I guess, than the wit-

77 ness. Their mills are at Lucien and McCalls. The mill at Brookhaven is a planing mill. I have not counted that in my list of sawmills.

Do you know about these other short lines, the Pearl River Valley and the Alabama & Mississippi?

A. The Alabama & Mississippi is owned by the Vinegar Bend Lumber Company. What is the other one?

Q. Pearl River Valley?

A. I am not familiar with that.

Q. Do you know of any sawmills located on the New Orleans, Natalbany & Natchez—that is, except at the junction point, Natalbany?

A. No; I do not.

Q. Do you know of any on the Kentwood, Greensburg & Southwestern?

A. No; I do not.

Q. And the Loranger, Louisiana and Northeast?

A. No; I do not.

Q. Nor on the Kentwood & Eastern, except the Madisonville mill?

A. No; I do not.

Q. That one at Madisonville is located on the Tchefuncta River, and I understand it makes water shipments largely for export across Lake Pontchartrain. The Liberty White——

A. There is no mill on the Liberty White now.

78 Q. None on the Natchez, Columbus & Mobile except at the junction points?

A. I don't know of any sawmill there. There are shipments of hewn timber off of that line.

Mr. PALMER. I might make the explanation here that I am asking that in support of my allegation that on all of these short lines connecting with the Illinois Central, which take arbitraries over the main line rate, there are actually no sawmills which pay that arbitrary. That these three mills marked on the map are the only ones in that whole district which pay an arbitrary over the group rates. Specifically there appear on this map the Pearl River Valley, the Alabama & Western, Mississippi & Western, and the Mississippi Eastern which take the main line or group rate. Incidentally the Mississippi & Western is owned by some lumber company; I have forgotten the name of it.

Q. What road is that?

A. The Mississippi & Western.

Mr. HUMBURG. Neither of those last are connected with the Illinois Central, are they?

Mr. PALMER. No; but the Mississippi & Western is owned by the Long-Bell Company. They are both lumber roads.

Mr. HUMBURG. Neither the Mississippi Eastern nor the Missis-

79 sippi & Western connects with the Illinois Central or the New Orleans Great Northern?

Mr. PALMER. Neither one; no, sir.

In connection with the map I offer a list of sawmill points on all the roads shown in the map, according to the Red Book of February, 1919. In some cases there are more than one mill, in which case the number is shown in parentheses. There are some junction points where there are mills, but I have included those points only on one road, and in the case of the other road I have given reference to them in parentheses.

Mr. HUMBURG. You mean by that, Mr. Palmer, that this exhibit about to be offered is to accompany your map?

Mr. PALMER. Yes.

Mr. HUMBURG. And shows the location of the sawmills in the entire originating territory?

Mr. PALMER. Yes.

Mr. HUMBURG. On main lines and branch lines and short lines as well?

Mr. PALMER. Yes, sir.

Mr. HUMBURG. Or is it only short lines?

Mr. PALMER. No; on all of them.

(The document was thereupon received in evidence, marked "Complainant's Exhibit No. 5, Witness Kimball," and is forwarded herewith.)

80 Mr. PALMER. For instance, at Hattiesburg there are five mills which are shown only on the Northeastern. In the case of the Mississippi Central I have an entry, "Hattiesburg, N. O. & N. E.," in parentheses. That makes the summary of the total mills on each line not exactly accurate, because I have counted in each case only the actual number of mills that are listed on that line. The summary is 377 mills on roads which take the group rates, and three mills at local points on roads taking arbitraries.

As to these other yellow-pine mills located in this territory, do you know in what markets they do business?

The WITNESS. I don't know the market of each individual mill.

Q. (By Mr. PALMER.) Generally.

A. In a general way they sell lumber in the same territory that we do, through the Middle States and up into New York, Tennessee, and Kentucky.

Q. In other words, you come in competition with them in all your markets?

A. We do.

Q. (By Mr. HUMBURG.) Who are "them"?

Mr. PALMER. The mills in that territory generally.

The WITNESS. The other sawmills.

Mr. HUMBURG. You mean all the sawmills on your Exhibit

81 No. 5?

The WITNESS. Yes.

Q. (By Mr. PALMER.) You know in a general way that they do actually make shipments to all of those places, the same as you do?

A. Yes, sir. So far as I know there is no marked difference between our method of handling our output and the methods employed or used by the other sawmills in that territory.

Mr. HUMBURG. And in other territories?

The WITNESS. I beg pardon.

Mr. HUMBURG. And in other territories?

The WITNESS. In the Southern States.

Q. (By Mr. PALMER.) In view of the fact, Mr. Kimball, that in all this territory surrounding you practically all the mills have the advantage of you of two cents or two and a half cents, as the case may be in the rate, can you estimate how it affects you in the sale of your product and the prices you receive, in view of this competition from that large territory?

A. There are no published price lists similar to that on cotton and corn and other commodities, but inquiries are circulated among all the sawmills and the brokers take the offers which are the lowest on inquiries. At other times they send representatives, lum-

82 ber buyers through the country from mill to mill, and ask for quotations on requirements. In selling lumber to these lumber buyers I ask them a certain price for a certain grade and size of

lumber, and they ask whether my price is f. o. b. the main-line rate, or f. o. b. our mill. If it is f. o. b. our mill, they make a deduction in the price offered or quoted, which amounts to two cents per hundred pounds on the estimated weight of the lumber. Different grades and sizes of lumber have a recognized weight, a list of which is published by the Southern Pine Association and other institutions, and they are well known and recognized among lumber men. In making me an offer they will frequently say, "I will bid you a certain price delivered on the main line, or 50 cents, or 75 cents per thousand less delivered on cars at your mill, the variation in the deduction being based on the weight of the lumber which they propose to purchase.

Q. If you were making a sale based on main-line delivery, you would, I presume, aim to get as near as you could what you thought the market justified, and what other mills were getting?

A. Naturally I try to get as much for our product as possible, and I watch such information as I am able to get hold of, to inform myself as to the prices and values of our product.

83 Q. When was it you said you began operations there?

A. In April, 1912.

Q. That was at a time when the old tap line situation obtained, I believe.

A. Yes.

Q. That brings me to a couple more exhibits, which have a special bearing on the Mississippi Central situation. Our contention is that there is no more reason why points on the Fernwood & Gulf should take an arbitrary over the main-line rate than points on the Mississippi Central should, which is also a lumber-controlled road; it is an east-and-west road, has no outlet itself to northern connections; it is an extra haul, no matter how the product goes out. The only difference is that of course the Mississippi Central has other connections at Hattiesburg.

In connection with that, I may be anticipating somewhat, and perhaps this should come in rebuttal, but I presume that the defendants will lay some stress upon the point that they are compelled by competition to accord main-line rates to the Mississippi Central, and in that connection I want to refer to the status of the rates on the Fernwood & Gulf and other tap-line connections of the Illinois Central at the time rates were established by the Illi-

84 nois Central in connection with the Mississippi Central. Covering that point I offer this statement in evidence as Exhibit No. 6.

(The document was thereupon received in evidence, marked "Complainant's Exhibit No. 6, Witness Kimball," and is forwarded herewith.)

Mr. PALMER. The gist of this exhibit is Note C, on page 58, of Illinois Central Tariff 506-A, I. C. C. No. 39969, which I notice, by

the way, has very recently been superseded by Speiden's Mississippi Valley Western Tariff. I have forgotten the number of it now.

Exam. SMITH. It will show on our copies what it has been superseded by.

Mr. PALMER. Yes; in fact, I just ran across that tariff the day before I started up here, and I did not have time to revise my exhibit. Anyhow the point is that at that time the Mississippi Central was actually carrying the rate back to the log from the Fernwood & Gulf and other lines similarly situated, for certain favored shippers, and in those cases there was no competition.

Our contention is that under these circumstances the rates both as compared with the Mississippi Central and as to the favored interests mentioned, was discriminatory against local points on these tap lines, and that the defendants are not in position to claim
85 at this time that any distinction should be made between the Mississippi Central, for instance, and the Fernwood & Gulf, on the ground of competition.

Along that same line I will file Exhibit No. 7, which sets forth a couple of cases, and in Speiden's Tariff 193 and 159, where the Illinois Central participates in Group 1 rates from points on the Mississippi & Western and the Alabama & Mississippi, via the Gulf, Mobile & Northern, via Ackerman, which point is just outside the boundaries of Group 1 and in a lower rated group. That is in addition to routing No. 5 in Speiden's Tariff, I. C. C. No. 193, which applies on traffic from the Gulf & Ship Island and the New Orleans Great Northern via Jackson, and routing No. 90 in I. C. C. 159 covering traffic from the New Orleans Great Northern, and routing No. 25, covering traffic from the Gulf & Ship Island.

(The document was thereupon received in evidence, marked "Complainant's Exhibit No. 7, Witness Kimball," and is forwarded herewith.)

Mr. PALMER. In other words, the point is that notwithstanding the Gulf & Ship Island and the New Orleans Great Northern are comparatively large roads as compared to the Fernwood & Gulf, at the same time they involve a two-line haul, the same as the Fernwood & Gulf, whereas in the two cases covered by my Exhibit
86 No. 7, it participates in a three-line haul on a group rate via a junction practically within the originating territory.

Mr. HUMBURG. Mr. Palmer, I suppose these tariffs, I. C. C. 193, shown on Exhibit No. 7, and also the other tariff below, I. C. C. 159, on the same exhibit, show, both of them, the application of this rate via other routes?

Mr. PALMER. Yes.

Mr. HUMBURG. In connection with the Mobile & Ohio and other roads?

Mr. PALMER. Yes. That is all, I believe, unless you think of something more before you get through.

Cross-examination:

Q. (By Mr. HUMBURG.) Do you know how much higher the rate was from Knoxo and from Fernwood to the Ohio River at the time that your sawmill was located at Knoxo?

A. Yes.

Q. How much was it?

A. Two cents.

Q. You knew at that time, I take it, that there was this difference between the rate from Knoxo on the one hand and from Fernwood on the other?

A. Yes.

Q. That is true also as to Tylertown, I take it, or was Tylertown located after the location of Knoxo?

87 A. Tylertown was located a good many years previous to the location of Knoxo, and Tylertown takes the main-line rate as a connecting point.

Q. That is located on the N. O. G. N. Railroad?

A. On the N. O. G. N. Railroad; yes.

Q. The same as Fernwood is located on the Illinois Central?

A. Yes.

Q. Did Tylertown at the time you located your mill at Knoxo take a rate two cents lower than the rate from Knoxo?

A. Yes.

Q. What other mills are there at Knoxo than yours which are manufacturing lumber articles?

A. There is one small mill which has been put up within the last few weeks in the woods south of Knoxo and has been hauling their lumber up to the station.

Q. Is there not also located at Knoxo some kind of a mill that makes cooperage stock or other material?

A. No, sir.

Q. Are there not along the line of the Fernwood & Gulf at points other than Knoxo, Tylertown, or Fernwood, mills that manufacture cooperage stock, box material, or other lumber products?

A. There is one other mill.

88 Q. Only one other there now?

A. There is only one other mill that I know of on that line now.

Q. Making lumber?

A. Making lumber.

Q. And that is the one indicated by your cross?

A. Yes.

Q. West of Tylertown?

A. West of Tylertown.

Q. Are there any other mills that are manufacturing box materials?

A. No, sir.

Q. Or cooperage stock?

A. No, sir.

Q. Were there any such mills there during the time for which you claim reparation here?

A. No.

Q. Is it not true that there is an industry at Vaughts, Mississippi, or a manufacturer making cross-ties?

A. Not to my knowledge.

Q. Isn't there some one at Davo manufacturing piling and lumber, namely, the Colonial Creosoting Company?

A. The facts in that case are that piling and cross-ties are occa-
89 sionally hauled in by farmers or other individuals which are the products of manual labor and not, as you originally designated them, as manufacturing plants.

Q. The fact, however, remains that there are a number of so-called lumber companies or creosoting concerns, or pine timber companies and individuals manufacturing lumber and ties and piling all along the line of the Fernwood & Gulf, for the entire twenty-seven miles, wherever there is desirable timber for that purpose?

A. Not as I understand your question to indicate, that such companies as the Colonial Creosoting Company are operating there. They are buying the products of such individuals as may make ties, or piles, or piling, but to say that they have an industry located there, or that they are located, why I consider they are not. They make their purchases wherever they happen to be able to secure them.

Q. Your view is, and that may be the fact, I don't know, that these things are made or manufactured by the owners or contractors doing business there, and sold perhaps to the creosoting company and others who are shipping from there?

A. Yes.

Q. And of course the freight paid, if you know, is higher than is the freight paid from the junction point?

A. I presume so.

Q. That is the same as the rate from Knoxo?

90 A. Yes.

Exam. SMITH. Pardon me, but let me see if I understand that. This creosoting company that has been referred to, has it any sort of a creosoting plant on the Fernwood & Gulf?

The WITNESS. No, sir; but it has at another place on the N. O. G. N. at Bogalusa.

Exam. SMITH. But it ships from points on the Fernwood & Gulf to Bogalusa, creosotes the piling and sends it out?

The WITNESS. Yes.

Q. (By Mr. HUMBURG.) And the rate on that material is the same as the rate on lumber?

A. According to my understanding; yes.

Q. Can you tell us something about the value of lumber now per thousand feet, of the ordinary grades that you manufacture at Knoxo, compared with its value per thousand feet in 1912 when you located there?

A. The present value is at least double the value of the same class of lumber in 1912.

Q. You submitted an exhibit which shows 162 cars on which you asked reparation up to the present time. You say of those, 31 were consigned to points in Mississippi. Are we to understand from that that this involves the intrastate Mississippi rates as well?

91 Mr. PALMER. Those cars referred to that were shipped to points in Mississippi are not included in the list on which we claim reparation.

Mr. HUMBURG. Then this is not a case which involves the question of Federal control over State rates, I take it?

Mr. PALMER. No.

Mr. HUMBURG. You show 69 cars destined to points on and north of the Ohio River. Can you indicate in a general way your territory north of the Ohio River, without going specifically into the statement, because that would show for itself, but what I mean is, where in the territory north of the Ohio River do you sell largely and most largely?

The WITNESS. I would like a little information in regard to what your question implies. Is it a question of the delivery of the lumber?

Q. (By Mr. HUMBURG.) No; destination. I mean to destinations to which you ship.

A. We sell to brokers in large cities and they ship to various points in the country as they see fit. If you mean the destinations——

Q. That is what I mean.

A. (Continuing.)——of the lumber, I would say that a

92 great portion of the lumber which we ship north of the Ohio River goes to retail yards in Illinois, Indiana, and Ohio.

Q. Then are we to understand, Mr. Kimball, from your Exhibit No. 3, that the points therein shown are the actual destination points, or are they the respective locations of the brokers?

A. The points shown in this list are the destinations, to the best of my knowledge and belief.

Q. In selling to the broker do you sell to him for delivery at these specific destinations, or does the broker hold before you the usual blind?

A. It occurs in both ways. In the most of our dealings with one firm who handle a good deal of our output, they tell us the destination, and even the consignee, or their customer's name.

Q. That is the exceptional broker?

A. That is the exceptional broker. The usual broker will pay us a price delivered at the mill or delivered on a Chicago rate, or possibly a St. Louis rate, and he will then ship it to some other point, possibly in Ohio, where he has made a sale. In numerous instances we ship to Mounds or Cairo, or other reconsigning points on the I. C., according to the request of the broker to whom we make the sale.

Q. The general rule in the handling of all shipments

93 through the broker is that he requests you to consign it to Mounds, for example, or some reconsigning point, his purpose

in doing that being so as not to disclose to you who his customer is, and then in due course he sends on the bill of lading to the carrier and says to reconsign that now to my customer.

A. Yes.

Q. And he pays his reconsignment charge under the tariff and the shipment moves on; that is the usual way in which it is handled?

A. That is the usual way.

Q. In making your sale on such a shipment as that, you haven't in mind the freight rate to the ultimate destination to which that broker sends that car?

A. No, I have not; but I have in mind the fact that we have to absorb the two-cent arbitrary to compete with other sawmills in our territory, whether it goes to a reconsigning point or otherwise.

Q. In what proportion of instances have your shipments been through brokers as compared with the proportion of instances in which you would ship direct?

A. Why, with the exception of the Illinois Central Railroad, we sell almost entirely to brokers, except during the war period, which was abnormal, and we handled all of our business through the Southern Pine Emergency Bureau.

94 Q. The remainder of the shipments you say go to the Illinois Central as company material?

A. As company material.

Mr. PALMER. And some to New Orleans for export?

The WITNESS. Some to New Orleans for export; yes.

Q. (By Mr. HUMBURG.) This New Orleans export traffic, I take it, is not here involved?

Mr. PALMER. No.

Q. (By Mr. HUMBURG.) In figuring your selling price of lumber you have to take into consideration, I take it, many things aside from the freight rate?

A. We have to take into consideration all costs, the tendency of the market, the shortage of that particular commodity, if it should be short, or the surplus stock which may be held, so far as we know.

Q. The grade and cost of production?

A. Yes, sir.

Q. The cost of the timber?

A. Yes, sir.

Q. The expense of getting the timber out of the woods and into the mill?

A. Yes.

Q. And in that respect the other man has to take into consideration the same things?

95 A. Yes. We do not differ in any way that I can recall, from our neighbors around there.

Q. One man gets his timber near the mill, another man hauls it in by rail, and a third man drags it in by a drag right to the mill?

A. Yes.

Q. You said something about the manner of making the sales f. o. b. mill and f. o. b. destination point. Did you have in mind also f. o. b. reconsigning point? Is that ever taken into consideration?

A. We sell f. o. b. mill or f. o. b. main-line rate, or f. o. b. reconsigning point, or possibly on a Chicago rate, although the lumber might not ever be intended for Chicago.

Q. Yes.

A. In other words, in a sale of that kind the Chicago rate is merely intended to establish the deduction which will be made for freight charges from the net price.

Q. A shipment may go to some entirely different point?

A. Yes, sir.

Q. You simply use that as a sort of a trade proposition between you and your purchaser?

A. Yes.

Q. The fact that you will sell it to them f. o. b. Chicago does
96 not ordinarily mean that your purchaser really sends it to Chicago?

A. No, sir.

Q. In many cases he does with you in that respect as he does about the reconsigning at Mounds?

A. Yes; that merely establishes the freight rate to be deducted from the delivered price.

Q. Is it not more nearly accurate to say that it establishes the price rather than the freight rate?

A. Yes; that would be correct.

Q. Is it not true, Mr. Kimball, that there are along these few short roads that you have cited such cutting of timber and cutting of piling and manufacturing of lumber by individuals, other than big sawmills, exactly like there is along the line of the Fernwood & Gulf?

A. As far as I know, there are small operations along these other roads, the getting out of wood for pulp mills and pine knots for rendering plants at different points; not many of them; also hewn ties and piling.

Q. And those articles take the lumber rate?

A. As far as I know; yes, sir.

Q. Piling moves some considerable distance, does it not?

A. Yes.

Q. A desirable tree piling would go according to the demand
97 for it; distance would not make a very material difference?

A. It is the exception rather than the rule to ship piling any great distance as far as I know. The piling consists of two kinds, hewn piling and round peeled piling. The hewn piling is frequently sold to exporters and to railroad companies, and the round peeled piling is sold to railroad companies and used at creosoting plants.

Q. Is it not true that there is quite a considerable movement of this yellow pine piling to the Great Lakes for foundation purposes, breakwaters, and so forth?

A. I only know of one firm that makes any considerable shipments from that territory to northern points.

Q. And where are they doing business?

A. They are in the vicinity of Hammond.

Q. Are they located on one of those short lines that you cited?

A. I am not quite clear how they handle their piling out of the woods.

Q. Their office, you say, is at Hammond?

A. No; they have an office in New Orleans.

Q. I see, but you think they are shipping from the vicinity of Hammond?

A. I think they are shipping from that vicinity.

Q. From one of the short lines connecting there?

98 A. I am under that impression.

Q. You have not made any personal investigation, I take it, to ascertain whether there are any box factories on the short roads you have mentioned?

A. I have never taken occasion to look into it, but I don't know of any.

Q. How do you get the information upon which you based your evidence that there are no sawmills at several of these short roads that you have mentioned? Is that all based on the Red Book?

A. No; that is from personal observation traveling through the country by train or automobile, and from conversations with buyers of that class of material; driving through the country looking for sources of supply for their inquiries.

Q. Your competitors for the same kinds of lumber that you have, I understood you to say, you regard as being located in all of the Southern States. Have you any on the west side of the river in Arkansas or in Georgia east of the Mississippi Valley territory?

A. I don't know accurately, but if a mill west of the Mississippi River would make a delivered price on a carload of a certain kind and size of lumber, delivered up in territory we ship to, I am quite sure that any one of the brokers we do business with would buy it if he considered it a good purchase.

99 Q. Naturally, that is what any broker does do.

A. Any broker does that; yes, sir. So far as I know they are as much our competitors in the territory north of the Ohio River as the mills on the east side are.

Q. That is true also of the mills farther to the southeast?

A. Yes, sir.

Q. In Georgia and Alabama, if there are any of them?

A. Yes, sir.

Mr. HUMBURG. I think that is all.

Q. (By Mr. GREEN.) Mr. Kimball, haven't there been since the Fernwood & Gulf was installed out there quite a number of sawmills on that road?

A. There have been a number of small sawmills that have operated for a year or two, exhausted their timber and have gone out of business.

Q. During this war period were there not quite a number of portable mills, and are there not quite a number of portable mills, that hauled their lumber into this line and moved it out over it?

A. Well, "quite a number" is rather indefinite. I would like to know——

Q. You make it definite. I don't know; I am just asking the question in a general way.

A. There were some.

100 Q. There were some. Now, how many of them were there, Mr. Kimball?

A. There may have been some that I don't know about, but I have in mind—did you say during the war period?

A. During the war period and up to the present time.

A. I call to mind five.

Q. Five?

A. Yes.

Q. What was the average output of those portable mills, please, sir?

A. The average per month?

Q. Per day, or per month, or any figure, just so as to get it before the commission.

A. My idea is that they would produce five or six cars a month.

Q. Five or six cars a month?

A. Yes, sir.

Q. That is all of them together?

A. No; each mill.

Q. Each mill?

A. Yes; each mill might put out as many as five or six cars a month.

Q. Is it not a fact that during the last three years, say, of this extremely high price for lumber, that there have gone into

101 business a great number of these portable mills throughout our entire section down there?

A. A great number have gone into operation at different points, but they don't have any great supply of timber, and they are short lived.

Q. They cut out that tract of timber and then move to some other tract?

A. They move on to some other place, somewhere else. One man may operate at two or three different localities.

Q. And they have to have the same movement and the same freight rate troubles that you have got?

A. Provided they get on the same railroad we are on.

Q. Upon the same railroad, yes. You made some statements with reference to these other short lines here. Is it not a fact that there were operations of this kind throughout the entire pine-producing territory during this period to which I make reference?

A. Do you mean during the——

Q. The period of high prices for lumber.

A. Yes; the small operations developed at different points.

Q. Do you know, or could you undertake to say, how many small operations there were along these lines to which we have made reference here?

A. Do you mean that are shown in this map?

Q. Yes; on the lines shown in this map.

102 A. I would not undertake to say. I haven't enough knowledge to make any statement in regard to it.

Q. I see. But from your knowledge of the conditions down there, there were operations of this kind and character during this high-priced lumber period?

A. There were some.

Q. Yes.

A. Yes, sir.

Q. The extent of them you don't know?

A. The extent of them I don't know, except in a general way, that it was not large. That is, the output was not of a great volume.

Q. With reference to the output not being large, does that refer to each of the mills, or to the aggregate total?

A. To each of the mills. I was referring to each of the mills.

Q. You haven't any idea as to the aggregate total output of each one of these small operations from these several roads?

A. I don't think I understand your question clearly. You say the aggregate amount of each one of them?

Q. No; the aggregate tonnage.

A. The aggregate tonnage of all the mills?

Q. Yes.

103 A. That is a matter that I have no means of telling. That is outside of my business and I would not be in a position to know.

Q. Your testimony, then, excludes this phase of the situation?

A. My testimony in regard to what particular?

Q. The aggregate total output of these small mills.

A. Yes. I don't know what it may be.

Q. With reference to the amount of tonnage taking lumber and lumber rates off of the Fernwood & Gulf, do you have any accurate conception as to how your output compares with those other outputs that are tributary from these sources to which I have made reference?

A. I know that over a period of several years we have been the largest individual producer of tonnage for the road, but beyond that I am not able to state.

Q. You can not give the commission the proportion, then, between the aggregate output of other producers and your production?

A. I do not feel competent to do that; no, sir.

Q. As I understand your operation, your mill has a capacity of 45,000 feet per day?

A. Generally speaking; yes.

Q. Is it not a fact that during the period in question you
104 have had to run your mill double time, both night and day?

A. No, sir.

Q. You have not?

A. No, sir; we have not.

Q. Did you ever have to run it night and day?

A. Never have.

Q. You never have run it night and day?

A. Never have run it nights at all. No night operations.

Q. No night operations?

A. No, sir.

Q. I will ask you, Mr. Kimball, to state when you went to locate your mill at Knoxo, Mississippi, weren't you familiar with the fact that this arbitrary was in existence, and at Tylertown, at that particular time, by reason of facts which will be later developed, there was no arbitrary?

A. I was familiar with that.

Q. Yes.

A. But there are other conditions attaching themselves to the question of our location there which your question does not disclose.

Q. Tylertown is substantially six miles from Knoxo, and southward from Knoxo there runs the branch of the N. O. G. N. Railroad?

A. Yes, sir.

105 Q. And if your location had been had upon the N. O. G. N. road, you were aware that by so locating you would have enjoyed the benefit of the grouping rate applicable to this section?

A. We knew that. I knew it.

Q. Now, is it not a fact that when you went to locate your mill at Knoxo that the question of this additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber, and of whom you obtained your mill site, and that you made a written agreement with them by which you obtained your mill site and agreed as a part of the consideration to let your timber move over the Fernwood & Gulf Railroad?

A. That is a fact, and there is an additional fact that at that time the representatives of the corporation to whom you refer represented to us that it was their expectation and intention to extend the Fernwood & Gulf Railroad into Columbia, whereby we would have been given a cheaper export rate than we could get as the line has existed up to the present; and while we were aware of the existing two-cent arbitrary, we were influenced to locate at Knoxo by the fact that they expected to extend their line so we would get a cheaper export rate.

The members that composed the firm of the Swift
106 Lumber Company were more familiar with the export lumber market than they were with the interior market, and their intention in manufacturing this standing timber was to make export material out of it. It was the expectation of the owners of the Fernwood & Gulf Railroad at that time to extend their road to Columbia, and had they done so we would have enjoyed a lower export rate than we have had. We took for granted that they would carry out their intentions and their expectations as stated to us at that time, but on account of other matters which came up the road was not completed according to their intention.

It was our expectation to ship a large portion of our output to Gulfport and only have a small portion of our output marketed in the territory north of the Ohio River, generally referred to as the interior market. The facts subsequently developed changed all those expectations.

Q. I will ask you to look at the document I now present you and state whether or not that is a copy of the instrument in question.

Mr. PALMER. I would like to know what the object of this is?

Mr. GREEN. You will see that it has some little bearing. I will try to make the connection.

The WITNESS. Do you wish me to answer?

107 Q. (By Mr. GREEN.) Yes.

A. As near as I can tell from my recollection, I should say that this is a correct copy of a certain ageement which the Swift Lumber Company entered into with the Fernwood Lumber Company, whereby they secured to us a right of way for our lumbering or logging railroad.

Q. I will ask you, please, sir, to mark that as Exhibit 8 to your testimony. I ask to have that done in order to see if we can not get away from here to-day, as this will avoid the use of an extra witness.

(The document was thereupon received in evidence, marked "Complainant's Exhibit No. 8, Witness Kimball," and is forwarded herewith.)

Q. (By Mr. GREEN.) Mr. Kimball, the Fernwood & Gulf has just now been completed up to a junction with the N. O. G. N. Railroad at Columbia, has it not, at Foxworth, Mississippi?

A. That is my understanding.

Exam. SMITH. Is that near Columbia?

Mr. GREEN. Yes.

The WITNESS. My understanding is that that is so.

Q. (By Mr. GREEN.) You have made no complaint, as I understand it, of the export rates in this petition?

Mr. PALMER. No; that is not included in the complaint.

Q. (By Mr. GREEN.) Do you know, Mr. Kimball, what the
108 underlying causes of the non-extensions were, to Columbia?

A. I have been told that it was on account of adverse legislation against railroad companies, Government legislation against railroad companies.

Q. What amount of influence did the European war and the inability to purchase rail, have on the non-extension of that enterprise?

A. None at all.

Q. None at all?

A. According to my understanding the Fernwood & Gulf had bought and owned and were in possession of rail enough to put it through if there had not been unfavorable legal cases against the railroads generally referred to as tap lines.

Q. What have you to say as to the cross-ties and labor?

A. The Fernwood & Gulf owned a large quantity of cross-ties which they afterwards sold; but the question of labor during the years 1917 and 1918 was enough to prevent their extension of the line during those years. But at the time I referred to their expectation of extending the line to Columbia, labor was plentiful and prices were low. This was during the years of 1912, 1913, and 1914.

I may have gotten off of the point there.

109 Q. They had an expectation of extending and you had an expectation of that extension, in order to get the reduced export rates?

A. Yes, sir.

Q. No contract of that kind was made?

A. None at all; they told us they expected to put the railroad through to Columbia by the 1st of January, 1912, but there were no promises made us, and there were no contracts entered into.

Q. As I understand your operations, Mr. Kimball, you are export people?

A. Yes.

Q. And you knew the export game——

A. Better, yes.

Q. And you were not acquainted with the interior business substantially at all?

A. That is practically correct. I had had some experience in the interior, but the other members of the firm had not.

Q. As I understand it, there is a radical and practical difference between the export market and the interior market in lumber. Please explain the difference to the commission.

A. There is a great difference in the method of handling lumber; there is a difference in the process of manufacturing lumber

110 for export as against lumber intended for interior points. Export lumber is shipped rough, it is cut full to allow for shrinkage, and the sizes, dimensions, and grades are different from those generally used in the interior markets.

The rules of grading are entirely different; the customs are different in some ways; and in building a sawmill a manufacturer usually has in mind the markets where he intends to sell his output, and he builds his mill with the idea in view of making his lumber as cheaply as possible in sizes and lengths which will conform to the market he intends to sell in. Generally speaking, the export market

takes large sizes and rough material. The interior market takes boards and dimension, and requires that they be dressed.

Q. When did the export market stop?

A. July, 1914. It stopped just like that, too. [Snapping fingers.]

Q. After July, 1914, there was no more export market?

A. Practically none.

Q. At that time you had no selling representatives in the interior, and no member of your firm except you, in a slight degree, were familiar with the interior lumber game?

A. That is correct.

Q. I notice in the deed of the right of way it is stated
111 there that you have an anticipated operation of seven years.

A. That represents our expected life of operation when we went there, based on the timber we had purchased and the timber we felt reasonably sure we could secure.

Q. So the size of your mill was predicated upon the fact that you had a seven years operation?

A. Yes.

Q. As I understand the lumber business, it is a requisite that there should be allocated to a reserve depreciation a sufficient amount out of the cutting of each thousand feet to at the end absorb the value of your mill?

A. That is the theory of the Federal Trade Commission, but my observation has been that it is customary among the mills to write off depreciation annually into profit and loss instead of setting up a reserve. It is merely a difference in method.

Q. So that if your operation is projected beyond the expected period, what is the effect on your business as to netting a larger profit than would otherwise be the case?

A. The longer we are able to prolong the life of the plant, the more service or work we get out of it, the more value it has to us.

112 Q. Is it not a fact Mr. Kimball, that by reason of the location of this timber out there in that territory, that the arbitrary existing on this railroad was figured into the price when you made the purchase?

A. I can not say that it was. We naturally bought the timber as cheaply as we could. The fact that that timber was not close to either the Fernwood & Gulf Railroad or the New Orleans Great Northern Railroad left us somewhat isolated, and it was necessary to go to considerable expense before the timber could be moved.

Q. You would not tell the commission, would you, that these disadvantages which you have enumerated did not find expression and were not indicated in the price that you paid for this timber?

A. I have just stated that these disadvantages, and the fact that the timber was away from the railroad, did influence the price. We bought it as cheaply as we could, and these things influenced the owners of the timber to accept a lower price than they would if that

timber had been standing close to a railroad where it could have been logged at a less expense.

Q. Now, is it not a fact that by reason of the position of this timber, that you have no great amount of trouble with your labor? In other words, that your sawmill labor can be obtained in the territory where you are off of the main line railroad, at a price
113 that is lower than would normally be the case on the through avenues of transportation?

A. Well, that is a question that is subject to debate. We have not been troubled with strikes or organizations. We have at times paid our men less than other sawmills that were on a main line, and had more competition, but it is also true that we get a very inefficient class of labor, and that they are not to be depended upon the year around. At certain seasons of the year they leave our operation and go to work on their own farms or the farms of their neighbors, which operates to our disadvantage. It is a subject of discussion.

Q. These people have their homes around in your vicinity?

A. A number of them have.

Q. And they have a spare time when they are not in the crops, which spare time is utilized by you for the production of this lumber?

A. Yes; for the production of lumber.

Q. As I understand the selling price, there is no uniform quotation as there is on the cotton exchange or the board of trade in Chicago?

A. There is not. It might be likened to a series of trades wherein each man makes the best trade he can.

Q. When you go to make a trade there are in each indi-
114 vidual trade elements that have got to be worked out to the satisfaction of both parties?

A. That is true.

Q. Is it not a fact that you have sold your capacity during all of these years?

A. We have.

Q. And you have sold it at prices that you were willing to take for it?

A. Willingness might indicate something that did not quite exist at times. We were forced to move our lumber because it was such a bulky commodity we could not pile it up. We have been obliged at times to sell lumber for less than the cost of production.

Q. But that was back some years since, was it not?

A. That was in 1913, as I remember it.

Q. And for the movement that occurred in 1913 and 1914 there has been no protest made nor claim for reparation filed with the commission on the ground of the unreasonableness of the rates?

A. By us?

Q. Yes.

A. No, sir; not by us, for the very simple reason that we did not know that we had an opportunity to get rid of it.

Q. I beg your pardon.

115 A. I say for the very simple reason that we did not know there was any opportunity to get rid of it.

Q. Where did you get the idea that there was an opportunity to get rid of it?

A. We were informed by one of our customers that his traffic man informed him that this two-cent arbitrary which we had been paying for a number of years was illegal, I think, was the term he used. However, I don't intend to accuse the Fernwood & Gulf Railroad of illegal practices, but he said it could be set aside.

Q. You and the Fernwood & Gulf went along there for about six years perfectly happy until some foreign traffic man came in and said that this arbitrary business was illegal, and that is what started this lawsuit?

A. The question of peace and happiness might be said to continue to a certain extent. We were informed by this foreign traffic man that we were entitled to a main-line rate, and if we were entitled to it we wanted to get the benefit of it under the law.

Q. When did that information come to you?

A. I do not recall the date, but I have the letter in the file. I should say that it was something like the 1st of January.

Q. Of the current year?

A. Of 1919. If you will allow me to refer to this——

Q. Never mind about that; I don't care about it.

116 A. All right.

Mr. PALMER. All right. We can show you the letter if you want it.

Mr. GREEN. All right, if you want to put it in, but I don't care about it.

Q. (By Mr. GREEN.) As I understand it, the selling price of lumber is dependent on a great many other elements than merely the freight rate?

A. The selling price?

Q. Yes.

A. The freight rate has very little to do with the selling price.

Q. At the present time is it not a fact that if you can deliver lumber you can get a premium for it over what is currently said to be the list?

A. The price of lumber has been above the list for some time back, since, approximately, the fourth or fifth month of the current year.

Q. Where did you get that list?

A. The present list that I refer to was published by the Southern Pine Emergency Bureau, based upon maximum prices established by the War Industries Board, Lumber Department.

Q. As I understand you, the present list, then, is an outcome

117 of the United States Government acting through its war machinery?

A. That is correct; the list I have reference to.

Q. Will you please tell the commission how much over this list the price of lumber has now gone?

A. You mean at this date?

Q. Yes; right now.

A. Between five dollars and ten dollars.

Q. Isn't it even more than that in some grades?

A. In 1 x 4 flooring the price has gone up very high indeed.

Q. For instance, take your flooring; and is not the wholesale price of the best grade of flooring now in the neighborhood of $100 a thousand?

A. The present price of the highest grade of lumber that we produce is $80 per thousand at the mill. The point I have in mind is the edge-grain flooring is selling for about $100, but we do not make edge-grain flooring.

Q. I see. Will you please tell the commission the cost of producing this grade of flooring that you are selling on the basis of $80 a thousand?

Mr. PALMER. What is the object of that? I don't see that that has anything to do with the case.

The WITNESS. The cost of producing this grade of flooring is no more than the cost of producing the lower grades.

118 Q. (By Mr. GREEN.) About what does that average; please sir?

A. You mean at your operation?

Q. Yes, sir; at your operation.

A. About $27 a thousand feet.

Q. Will you please tell the commission what the average selling price of your output is at the present time?

Mr. PALMER. I want it understood that all this is going in subject to our objection.

Mr. GREEN. All the questions we are discussing now were threshed out back in the Central Yellow Pine case, as I understand it.

The WITNESS. The average selling price of our output for the past few months has been in the neighborhood of $35 a thousand for all grades.

Q. (By Mr. GREEN.) Now, will you please state whether or not you contend, as of the present date, that your rate to these points is in and of itself unreasonable?

Mr. PALMER. I think that is a question of argument. We allege that it is unreasonable.

The WITNESS. I don't know exactly what you mean by unreasonable.

Q. (By Mr. GREEN.) Mr. Kimball, approximately how long before the timber, and all timber tributary to the Fernwood & Gulf, will be cut off?

119 A. Within a very few years.

Q. Will you please state whether or not the approximate tonnage of the Fernwood & Gulf Railroad does not consist of approximately 95 per cent lumber and forest products?

A. That is the idea of the proportion as it exists in my mind, without the support of any actual figure.

Q. Now, will you please tell the commission what will be the condition of the Fernwood & Gulf at the end of this short period to which you made reference, when this timber is all cut off?

A. Their tonnage would be greatly reduced.

Q. Wouldn't it be practically annihilated?

A. I would not go so far as to say that, because other occupations are taking place. There has been some considerable movement toward truck farming in that neighborhood, and while the present amount of tonnage is not great, there is always a possibility of improvement in it. But unquestionably the tonnage of the Fernwood & Gulf Railroad Company will be greatly reduced.

Q. At the present time do you have any trouble in selling your lumber on an f. o. b. basis at your mill?

A. It is a fact we have no more trouble selling f. o. b. mill than we would f. o. b. delivered.

Q. I know, but is it not a fact that you can sell all of your lumber f. o. b. mill?

120 A. Yes.

Q. And you can sell your lumber f. o. b. mill at a price $5 to $10 a thousand over the list put out by the War Industries Board?

A. That is a fact.

Q. Do you know what other people around about your neighborhood are obtaining for their lumber?

A. So far as I know they are getting the same prices we are.

Q. With reference to these contests about the arbitraries, adding on and taking off, that you were speaking of to Mr. Palmer, when did those transactions occur?

A. I beg your pardon; were you referring to me?

Q. Yes.

A. Oh, I beg your pardon. I did not get that. Will you please repeat the question?

Q. Read the question.

(Question read as above recorded.)

A. I don't think I get the connection.

Q. In other words, as I understood your testimony, you were having considerable difficulty in moving your tonnage by reason of these arbitraries on the rate, and there were discussions of it, and I wanted to fix the date of those discussions.

121 Mr. PALMER. You mean those cases where he said he had sold lumber delivered, and the buyer would deduct the arbitrary nevertheless.

The WITNESS. I understand the gentleman now. These transactions occurred back in 1913 and 1914.

Q. (By Mr. GREEN.) Since 1913 and 1914, as I understand it, you have not had any of that kind of trouble?

A. I have taken occasion to explain our position, of being under a two-cent arbitrary, and have advised them of that fact in making our quotations, except, of course, those with whom we were doing business regularly and who understood conditions.

Q. That condition obtained back in 1913 and 1914 and has not caused any friction since that date, as the parties to it understood what you were doing?

A. Yes; that is true.

Q. Do you know, please, sir, anything about the real history of the rate development down in that territory? If you don't just say so, and I won't ask you any questions about it.

A. No; I don't feel competent to answer that question intelligently.

Q. Are you in a position, Mr. Kimball, to know anything about the number of short-line railroads and plussing junction points in the United States?

A. No; I do not. I never had any occasion to look into
122 it or make any inquiry about it.

Q. How much is the price of stumpage, or how much has the price of stumpage advanced since you bought your stumpage?

A. It has doubled in value.

Q. Is it not a fact that an individual producer of lumber, by reason of making specific grades in a certain way, can obtain considerably over the market for those grades in which he specializes?

A. I don't believe I gather the point, Mr. Green.

Q. Will you read the question, please?

(Question read as above recorded.)

A. No; I think not. He can work up a good reputation for a well-manufactured product and obtain a small advantage in price, but I never considered that it was such as to have any great bearing against the open market. He would get the preference during a dull period, but that is not the case now.

Q. When you were speaking of the controlled roads in this territory, what knowledge have you of those facts; that is, personally?

A. I have been traveling around through the territory mentioned for several years past, and I have seen these lumber companies bringing in their logs over these roads. I have been told upon reli-
123 able information, and I consider it to be a matter of common knowledge, that these roads I referred to as being controlled by these lumber companies were built for the express purpose of bringing the standing timber which these companies owned to the mills that these companies had built.

Q. Now, if that is a fact, will you please explain why the Mississippi Central built 160 miles from Hattiesburg over to Natchez?

A. They have never favored me with their reasons for doing it, but I know it to be a fact that they began building the road to get to the timber which they owned along the line of the road. As to why they purchased a road which had been built out from Vicksburg——

Q. Hattiesburg.

A. No; I am talking about the west end of their line.

Q. All right.

A. Why they purchased a road which had been built out from Vicksburg——

Mr. PALMER. Natchez.

The WITNESS. Yes, I am wrong; from Natchez, and joined it up with a road which they had extended through their own properties; I can only conclude that they looked upon it as likely to be a profitable investment.

Q. (By Mr. GREEN.) Did they not begin at the other end and build over to Natchez?

124 A. I understand not, although I am not positive.

Q. Was not the first part of that road constructed, refreshing your memory, the Pearl & Leas River Road?

A. This railroad at the first time I ever saw it, in 1904, extended from the mills of the J. J. Newman Lumber Company at Hattiesburg and at Sumrall in a westerly direction to a station named Silver Creek.

Mr. PALMER. Just to clear that up, my understanding is that the Mississippi Central was built west from Hattiesburg to Brook Haven. The west end of the present Mississippi Central was built east from Natchez and originally known as the Natchez & Eastern, and was completed into Brook Haven about the same time, and they met there, and the Natchez & Eastern was first leased by the Mississippi Central, and then consolidated with it. That is according to Poor's Manual. I think that makes clear some of the questions Mr. Green has asked.

Q. (By Mr. GREEN.) Now, of your own personal knowledge, do you know anything about the segregation of the Fernwood & Gulf from the tap-line controversy under an order of the commission, when you spoke of it as being controlled by the Fernwood Lumber Company?

A. It is merely a matter of hearsay with me that the Fernwood & Gulf Railroad was divorced from the Fernwood Lumber

125 Company a few years ago, and that the officers of the Fernwood & Gulf have no official position with the Fernwood Lumber Company, and vice versa. But further than that I am unable to say.

Q. It is just a matter of hearsay with you?

A. Just a matter of hearsay; yes.

Q. The actual facts you don't know?

A. I don't know the actual facts.

Q. The same thing is substantially true, is it not, Mr. Kimball, with reference to these other little roads?

A. I understand that such is the case, growing out of the adverse legislation that I referred to in one part of my testimony, as being the probable cause for the nonextension of the Fernwood & Gulf Railroad into Columbia, in 1912.

Q. Do you know, please, sir, how much of the timber has been cut off of these little railroads? For instance, take the K. & S. E.; how much of the timber is cut off of there now?

A. It has been greatly reduced. You might say it is reduced to a small per cent of the original crop.

Q. I was in error; I should have said the K. & E., instead of the K. & S. E.

A. All right.

Q. You don't know anything about the K. & S. E.?

A. No. The K. & E. I had reference to.

126 Q. Is it not a fact that all of the timber was cut off of the K. & E. by as many as, say, thirty small mills operating at one time until the timber along its line was all manufactured into lumber?

A. I know that there were a number of small mills, but I am of the opinion that the number thirty is too high. I should be inclined to place it at about half of that, or possible twenty mills; but I have not full and accurate knowledge of it.

Q. The cutting by these mills along this line moved, did it not, under an arbitrary of 1½ cents plus for that timber coming off of the narrow gauge, 50 cents a thousand additional for transfer?

A. I think the best answer to that would be the tariff covering it; my understanding is that the statement you made is substantially correct, but I think the tariff would be better evidence, if you will excuse the suggestion.

Q. With regard to this compilation of sawmills which has been turned in, those did not include any portable mills at all, did they?

Mr. PALMER. I guess I can answer that better, as I made up the list. It does not. I do not understand that the Red Book includes small portable mills.

Exam. SMITH. It was not the intention to include them?

127 The WITNESS. It was not the intention to include them.

Mr. GREEN. If any are in there, it is by accident?

The WITNESS. It was intended to represent substantial industries.

Mr. GREEN. It does not include these mills that have cut out their timber and moved during the last several years?

The WITNESS. No.

Mr. GREEN. That is all; thank you, sir.

Redirect examination:

Q. (By Mr. PALMER.) There are two or three points I want to debate over. You answered Mr. Green that you had no trouble selling lumber f. o. b. mill, and there was something said about getting the same price at mills on the other road. Did you mean that you get the same f. o. b. mill price as they get?

A. No; I didn't intend to give that impression. Whenever we sell any lumber we get as much as we can for it, but we always have to assume the arbitrary rate there by having the freight bill to destination deducted, or the freight bill to an agreed point de-

ducted, or making the deduction for the excess rate from our net price.

Q. You could get the same delivered price but not the same mill price, in other words?

A. Yes.

128 Q. There was something said about stumpage doubling in value. Is that the case with other mills in that vicinity as well as yours?

A. That question was not sufficiently clear, because I answered the question on the assumption that Mr. Green was referring to our original purchase of stumpage.

Q. But stumpage generally throughout the territory has increased in value?

A. Generally it has increased.

Q. That is not peculiar to you alone?

A. No; that is a general condition.

Q. Now, on this question of unreasonable rates, if a certain rates apply from a point on the Illinois Central, say, fifty miles south of Fernwood, would you consider it reasonable that the same rate should apply to a point twenty-seven miles beyond Fernwood on another line?

A. I would not consider it reasonable.

Q. To apply the same rate?

A. To apply the same rate for hauling lumber 27 miles as for hauling it 50 miles or 75 miles farther.

Q. In other words, if you take the rate from points farther south as a basis for a reasonable rate, then what would you say as to a higher rate from Knoxo, for instance?

129 A. I would say that it would be unreasonable for us to have a higher rate than other points farther away from the destination of the product.

Q. Take the points on the A. & M.; if a certain rate is reasonable down there, down in the southeast corner of this group, what would you say as to a higher rate being reasonable up here in the middle of the group, with a less haul?

A. I should say that the higher rate was unreasonable.

Q. Something was said about your depreciating your mill. Have you depreciated it 100 per cent?

A. No; for the reason that while we began writing off an annual depreciation of 20 per cent, upon an investigation of our books by the examiner for the Government income tax for the years 1913, 1914, and 1915, he refused to allow the depreciation of 20 per cent, but did allow a depreciation of 10 per cent, and we have subsequently adjusted our books to a 10 per cent annual depreciation of the remainder of the value on the books. In other words, at the end of 10 years there would still be a remaining value on our books which we estimate would be the salvage value of the porperty in question.

Q. Now, about this purchase of your timber; in the first place, how far do you log your timber?

A. We have between twelve and thirteen miles of steel, and
130 it is all laid out. Some of it is on branches and side tracks, but we haul our logs approximately twelve miles.

Q. You have a regular logging railroad, the same as the others down there?

A. We have a regular logging railroad and haul our logs to the mill on a logging railroad, as is the common practice with all mills of any size in this territory.

Q. There was something said about your locating on the N. O. G. N.; would that have been physically possible?

A. It would. Do you wish me to elaborate on that?

Q. What I want to get at really is, if the person whom you bought your timber from had known you were going to locate on the New Orleans Great Northern would he have charged you any more for the timber?

A. No.

Q. That did not have any bearing really on the price at all?

A. No; not at all. As a matter of fact, the sellers of the timber did not know where we were going to locate our operation. We did not know ourselves for a while.

Q. You were speaking about the cost of production. The average cost of $27, does that include the stumpage?

A. That includes the purchase price of the stumpage; not its present valuation.

Q. That is an average price?

131 A. An average price.

Q. I mean an average cost.

A. Yes; that is an average cost.

Q. But there are some bookkeeping methods by which you would assign a greater cost of production to higher grades of timber, are there not?

A. The method has been worked out and it has been suggested and set forth by the Southern Pine Association, but we have not adopted it.

Q. In this Exhibit No. 3, the claim for reparation, it goes back to January 1st only. Will you explain what the character of your work was during the war?

A. During the war period, while the War Industries Board for the Government were making purchases of lumber, our output was sold and delivered, about 90 per cent of it, to the Government requirements on Government orders for cantonments, or for the Emergency Fleet Corporation.

Q. How did the prices you got for that compare with those for everybody else?

A. The prices we received were the same.

Q. The freight rate did not really work against you under those abnormal conditions?

A. There was no deduction made from our price for the two-cent arbitrary.

Q. That was the reason you have not gone back into that period in making up your claims?

132 A. That was the reason I did not show the previous shipments.

Exam. SMTH. Let me see now; as I understand the case at the present time, you would be entitled to claim reparation back from and including July 3, 1917?

Mr. PALMER. Yes.

Exam. SMTH. And are you now waiving all excepting from January 1, 1919?

Mr. PALMER. We are not specifically waiving it, but it is a question how much we will be able to dig up which was not subject to these peculiar conditions which the witness has just explained.

Exam. SMTH. Is your statement substantially this, that there were only a few sporadic shipments other than these?

Mr. PALMER. If you get back two years from July we may get quite a number of them, but during the latter portion of that two years I guess they were pretty few.

The WTNESS. There was always some part of our output that the Government did not want.

Mr. PALMER. That is simply an explanation of why we have taken that period as a basis for formal proof of damage at this time.

Exam. SMTH. I see. The question before us to-day is

133 whether there was any unreasonableness in the rates, or whether the rates were unduly prejudicial, and so on, and if the commission should find reparation due, why the parties would be able to check the cars. Is that your understanding Mr. Palmer?

Mr. PALMER. Yes, sir. At the same time, we have to make some formal proof of damage.

Exam. SMITH. Yes. Some shipments did move during the period covered by the complaint?

Mr. PALMER. Yes. I think that is all, except there is one thing I want to get Mr. Green to explain. You spoke about the Fernwood & Gulf being extended to Foxworth. Just where is that?

Mr. GREEN. Right out of Columbia.

Mr. PALMER. Right out west of Columbia?

Mr. GREEN. It would go in on the track of the N. O. G. N.

Mr. PALMER. In other words, that would be the export proposition that Mr. Kimball was speaking about?

Mr. GREEN. As soon as we can get in there it is our intention to go.

Exam. SMITH. Is that the complainant's case?

Mr. GREEN. Just one question, if your honor please: Mr. Kimball, you are not an expert rate man, are you?

The WITNESS. I am not.

Q. (By Mr. GREEN.) When you begin to talk about reason-

134 ableness of rates, that is out of your line?

A. What I consider reasonable and unreasonable would not be based on my knowledge of freight rate bases. It would only be my idea of what was just and fair under existing circumstances shown in the case.

Q. Do you pretend to tell the commission that you could not, at the present time, with the demand for lumber as it is, add this arbitrary to the price of your lumber?

A. We have been doing it. I don't pretend to say that we could not do it, because we have been doing it. It is a fact that we have done it.

Exam. SMITH. Is that all from this witness?

Mr. PALMER. Do you say you have added your arbitrary to the price of your lumber?

The WITNESS. Perhaps I was not quite clear. What I understood him to say was whether we deducted it from our net profits, or added it to the cost of production, which would amount to the same thing. I understood him to mean that.

Mr. PALMER. You mean you added it to the cost of the lumber?

The WITNESS. Yes; the cost of the lumber.

Mr. GREEN. No, I go one step further; is it not a fact that with the present demand for lumber you can get almost any price
135 you want for it, and the tonnage will move if you have got the lumber?

The WITNESS. The price of lumber is not out of all bounds. We can sell every bit we can make and we can move it. We have been able to move it up to the present time.

Q. (By Mr. GREEN.) And the two cents is being added——

A. We have absorbed the two cents.

Q. Have not your purchasers absorbed a good many two cents when you sold f. o. b.?

A. No; they would always deduct from their f. o. b. mill price.

Q. Is that an actual fact, that every one of them deducted it from that price?

A. Where a sale was made by correspondence, I could not say what they did, but they had to pay that extra two cents, and I assume if they did not have to pay it they would be willing to pay that much more. It was a part of the expense.

Q. You mean they could not have just that much more profit when they resold it?

A. Yes.

Mr. GREEN. That is all.

(Witness excused.)

Exam. SMITH. Gentlemen, we will take a recess until 2.00 o'clock this afternoon.

136 (Whereupon, at 1.00 o'clock p. m., December 18, 1919, a recess was taken until 2.00 p. m.)

AFTER RECESS.

2.00 o'clock p. m.

J. L. SHEPPARD was called as a witness, and, having been duly sworn, testified as follows:

Direct examination:

Q. (By Mr. HUMBURG.) Will you give your occupation, Mr. Sheppard, and your connection with the Railroad Administration?

A. I am the assistant general freight agent of the Illinois Central and the Yazoo & Mississippi Valley Railroad, with headquarters at Memphis, Tennessee.

Q. You are familiar with the rate adjustment involved in this hearing?

A. Yes, sir; I am.

Q. Will you file a map of the Illinois Central indicating the location of the Fernwood & Gulf Railroad, the Illinois Central, the Yazoo & Mississippi Valley, and also Knoxo and other points, including points of destination?

A. I have only two copies of this map, and I would like the privilege of sending the complainants a copy of the map marked, if that will be satisfactory.

Mr. PALMER. That will be all right.

137 Exam. SMITH. Very well, you may do so.

(The map was thereupon received in evidence, marked "Defendants' Exhibit No. 1, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This map is offered for the purpose of general information as to the location of the various roads and the sections under discussion here, and I have indicated by a pencil circle in the lower part of the map the location of the Fernwood & Gulf Railroad, extending from Fernwood, Mississippi, to Kokomo, Mississippi.

Q. (By Mr. HUMBURG.) How long have you been familiar with this rate adjustment, and in that connection what has been your railway traffic experience?

A. I have been connected with the Illinois Central Railroad for about twenty-two years. During the last ten or twelve years I have been connected with the traffic department exclusively, and during the last ten years have been in the rate department, having to do with the adjusting and revising of rates and divisions in this particular territory which is involved.

Q. You have had again and again to do with the lumber rates?

A. Yes.

Q. From this territory to the destinations involved?

138 A. Yes, sir.

Q. What is the character of the lumber shipped from points on the Fernwood & Gulf Railroad?

A. Yellow pine only.

Q. What is the territory of production of yellow pine lumber on the Illinois Central and Yazoo & Mississippi Valley Railroads?

A. Practically the entire production of yellow pine lumber on the two roads named is in the territory south of the Alabama & Vicksburg Railroad, which is shown on the map as extending from Vicksburg to Meridian, Mississippi. The producing territory extends through Mississippi to points in Louisiana about thirty or forty miles north of New Orleans. There is some production of yellow pine on the Illinois Central north of the A. & V. Railway, mills of fair size being located at Canton, Mississippi, twenty-three miles north of Jackson, Mississippi; and at Kosciusko, Mississippi, on the Aberdeen branch. There are also a few other small mills on the Aberdeen branch, but the total production of pine lumber on the I. C. R. R. north of the A. & V. is small.

Q. For purposes of rate adjustment, how is the territory of production of these two roads, the Illinois Central and Yazoo & Mississippi Valley treated?

139 A. For purposes of rate adjustment practically the entire producing territory of the I. C. and Y. & M. V. is included in one group, the same rates having been observed from all points in the group to Ohio River crossings and points taking the same rates; and to the territory beyond the Ohio River crossings, including eastern and Virginia cities. Of course, to territories south of the Ohio River, including points in Tennessee, Mississippi, and Louisiana on the I. C. and Y. & M. V.; that is, points either within the group itself or contiguous thereto, the rates are not grouped or blanketed, but are on a mileage scale or are graded or relatively rated.

From what I have stated it will be observed that it was the purpose of the Illinois Central Railroad and the Y. & M. V. Railroad to apply from its producing district of yellow pine lumber the same rates to the important consuming markets of the country. The exceptions are such as would occur in any group adjustment of rates, and cover points where distances or other conditions must necessarily be considered a factor in the fixing of rates.

Q. What considerations prompted these two roads in establishing one group of rates from their own producing territory?

140 A. In the first place, the character of production was the same. The markets of consumption, that is, the principal markets, were located at considerable distance from the territory of production. It was desirable, therefore, to maintain on a parity all of the mills located on the same line of railroad in close proximity to each other.

In the second place, it was felt necessary to so adjust the rates from the producing section of the Illinois Central and Yazoo & Mississippi Valley as to enable its mills to compete in the principal markets of consumption with mills located in other producing territories.

Further along it will be my purpose to explain more in detail the competing producing sections of yellow pine, and the adjustment of rates therefrom.

Q. When the basis of rates you describe was established by these two roads, were the same rates made applicable from points on connecting lines in Mississippi and eastern Louisiana, and were divisions or proportions allowed to tap lines and similar short connecting roads?

A. The basis of rates established by the I. C. & Y. & M. V. was originally published to apply from stations on its own rails. From points on connecting railroads it was the policy of the roads named to observe combination except where competition compelled otherotherwise.

141 No allowances in the nature of divisions were made to the tap lines or to similar short-line railroads, so called.

Dealing with the situation in 1893, when rates from points on the Illinois Central Railroad were reduced to the level of the rates from points west of the Mississippi River to important consuming markets at the Ohio River crossings and points beyond, the only connections of the Illinois Central in the pine-production section were the Alabama & Vicksburg and a few short or tap lines serving mills reached by the Illinois Central itself. The A. & V. Railway was a part of a system of trunk lines known as the Queen & Crescent System. That road made its rates the same as the Illinois Central Railroad, but its routes were not in connection with the Illinois Central, being a competitor, although it did maintain some through rates in connection with the Illinois Central.

From the tap lines or other short railroads the established basis was combination of locals on the Illinois Central junctions, and dealing with this situation as of 1893 at the time we readjusted our pine-lumber rates to meet the competition from the West, the western producing field at that time was much nearer the consuming

142 territory than it is to-day. They subsequently revamped the western territory, and I will cover that a little bit later on in my testimony. In other words, the pine rate adjustment west of the river started in Missouri, and it was in Missouri and north Arkansas at that time that we undertook to meet this competition from the West.

Q. When in 1893 this adjustment to which you have referred was established, what trunk lines were then operating in this yellow-pine producing territory in Mississippi and eastern Louisiana and what basis of rates did those lines observe?

A. The other trunk lines operating in the territory described were the Mobile & Ohio Railroad, the Alabama & Vicksburg Railway, and New Orleans & Northeastern Railroad, the latter two being part of the Queen & Crescent route, and the Louisville & Nashville Railroad.

These lines established, and with some exceptions maintained, the same adjustment as applied from the Illinois Central stations to

important consuming markets at the Ohio River crossings and the territory beyond.

In other words, Mr. Examiner, they made their rates the same as the Illinois Central, and when the Illinois Central revised its rates they revised their rates, but the Illinois Central had nothing to do with their adjustment.

Q. If you know, what was the general policy of the carriers
143 east of the river in the Mississippi Valley and in the Southeast, which served the yellow-pine producing sections, with respect to the extension of the trunk-line basis of rates to points on short lines, or the so-called tap lines?

A. The policy of all of the roads in the territory referred to was not to apply the trunk line basis of rates from points on connecting lines or short lines. Such rates were either on combination basis or were made arbitraries over the junction point rates, or over the rates from points on the standard trunk lines.

Q. Was this general policy of the roads east of the Mississippi River observed generally by all lines at the time of the reduction of rates in 1893 to meet the rates from producing points west of the Mississippi River, and if there was any change in policy at a later date, will you explain what that change was?

A. The general policy of not extending the trunk line basis of rates to points on connecting or short railroads was followed by all of the railroads in the South for a number of years. Subsequently the Mobile & Ohio Railroad and the New Orleans & Northeastern Railroad extended the trunk line basis of rates to certain of their short line connections, or to tap lines with which they connected.

Just when this change of policy on the part of the Mobile &
144 Ohio and New Orleans & Northeastern was made I am not informed.

Rates from certain of the more important railroads in the sections, such, for example, as the Gulf & Ship Island, the Mobile, Jackson & Kansas City, now the Gulf, Mobile & Northern, were established on the trunk-line basis from time to time; and the G. M. & N. Railroad has in one instance extended the trunk line basis to a short line connection, namely, the Mississippi & Western Railroad, but I am not advised as to when it extended this basis to the tap lines or short lines with which it connected.

The extension of the trunk line basis by the M. & O. and the N. O. & N. E. to their short or tap line connections was first brought to the attention of the Illinois Central in connection with the hearing before the Interstate Commerce Commission of certain cases which occurred in 1904, and which involved the adjustment of rates on pine lumber from the whole southern producing territory, which I will refer to a little bit later on.

Q. Will you now explain, or rather outline in a general way, the territory of production of yellow-pine lumber in the United States, and tell how this territory is divided or grouped by the carriers for the purpose of their rate adjustment?

145 A. The production of yellow-pine lumber in the United States is confined to the southern part of the State of Arkansas, the southeastern part of the State of Texas, the State of Louisiana, the southern and southeastern part of the State of Mississippi, the States of Alabama, Georgia, Florida, and the Carolinas.

The lumber produced in the section described moves in greatest volume to the markets at Ohio and Mississippi River crossings and the territory beyond, generally known as Central Freight Association territory, and to eastern trunk-line territories.

The markets at Ohio and Mississippi River crossings and in the Central Freight Association territory are, comparatively speaking, about equidistant from the various fields of production, these markets having been highly competitive as between the producing fields, and as a result of the conditions described there has grown up a relationship of rates from the producing fields to these common markets.

In this rate adjustment, to the Ohio River crossings and C. F. A. territory, the territory of production has naturally divided itself into three zones or groups. First, the territory west of the Mississippi River; second, the territory in the Mississippi Valley embrac-

146 ing the section served by the I. C., M. & O., part of the Queen & Crescent route, and the L. & N. Railroads; third, the southeastern zone, which lies to the east of the Mississippi Valley, or second group which I have just described.

Q. To what extent, if at all, have these three divisions or zones of the territory you have described the same or blanket rates to any given territory or destinations?

A. As stated in reply to the last question, these three producing fields lie about equidistant from the principal consuming markets of the country, located at the Ohio and Mississippi River crossings, and in the section known as the Central Freight Association territory. To this particular territory alone—that is, the Central Freight Association territory—there is a relationship in the rates on yellow-pine lumber from the entire producing field. I am speaking now of the three fields when I use the word "field."

But there is no blanket rate adjustment by which the same rate is applied from the three producing fields described to any destination.

To the Ohio and Mississippi River crossings and Central Freight Association territory, however, the trunk-line carriers serving the three producing fields described have established and main-

147 tained for many years a relationship of rates more or less fixed, the purpose being to permit the competition of mills in the distribution of lumber in these common markets.

These rates, however, are grouped to a greater or less extent in each of the three fields or zones mentioned. In other words, I mean, Mr. Examiner, that there is no general rate adjustment by which from all three fields the rates are the same; but in the fields themselves, the three fields I have described, there are rates more or less grouped in these different sections.

For example: From the territory west of the Mississippi River there is a zone or blanket rate covering the entire producing field located south of the Arkansas River and extending to the Gulf of Mexico, including the eastern part of the State of Texas, and in this territory which was blanketed or zoned some years ago, and prior to the commission's decision in the Chicago Lumber and Coal case, they took into consideration and made one blanket or zone, including short railroads and long railroads and trunk lines, and that will be referred to in some exhibits and some testimony I will offer a little bit later on.

In the middle field—that is, the Mississippi Valley territory served by the Illinois Central and the Mobile & Ohio, and in part by
148 the Louisville & Nashville Railroad as well as various short lines—there is, generally speaking, a group adjustment including points on the important roads located on and south of the A. & V. Railway from Vicksburg to Meridian, Mississippi, and thence over other roads to Selma and Montgomery, Alabama. North of the line described the rates vary, in some instances being the same as from the group south of the line, and in other instances less.

There are exceptions to the general basis; for example, the L. & N. Railroad does not maintain the same rates to St. Louis as does the Illinois Central, M. & O., and so forth.

From the short lines, or tap lines, except those connecting with the Mobile & Ohio and New Orleans & Northeastern, the rates are made differentials or arbitraries over the rates from points on the main or trunk line. This condition has existed for many years, and has been considered in important cases by the Interstate Commerce Commission, in which it has reviewed the entire lumber-producing section adjustment, as I will show later on.

In this particular proceeding we are interested in the Mississippi Valley section. Therefore I have prepared a statement which I will now offer as my Exhibit No. 2.

149 (The document was thereupon received in evidence, marked "Defendants' Exhibit No. 2, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This statement shows all of the roads in the pine-production section of the Mississippi Valley, and the rates from important shipping points to representative destinations, as covered by Exhibit A of the complaint.

Taking Memphis, the first point on that exhibit, it will be noted that the rates from the Mississippi Valley producing section range from 12½ cents to 22 cents per hundred pounds. The rate from Knoxo, Mississippi, is 16.5 cents per hundred pounds.

The complaint makes special mention of the adjustment from the Pearl River Valley Railroad, and it will be noted that the rates from points on that road to Memphis are one-half cent per hundred pounds higher than from Knoxo.

Reference is also made in the complaint to the Mississippi Western Railroad, and from the statement it will be observed that the rate

from Mississippi Western stations to Memphis is not lower than from Knoxo. In other words, it is 16.5 cents; and in looking at that I note that the point shown on the Mississippi Western is Foulke. The proper way to spell that town is F-o-u-k-e.

150 Attention is also directed to the fact that the rates from trunk lines are not uniform. For example, the rate from Fernwood, on the Illinois Central, is 14 cents; from A. & V. and N. O. & N. E. points, 15 cents; from Mississippi Central points, 15.5 cents; from the N. O. G. N. and G. M. & N, stations the rate is 16.5 cents. This adjustment to Memphis was reviewed by the Interstate Commerce Commission in case No. 4942, 27 I. C. C. 507, and the commission approved in that case different rates from the several trunk lines, the N. O. G. N. rates being subsequently approved by the commission in its unreported opinion No. A–488.

I was under the impression, after reading the original complaint, that it included New Orleans, Louisiana. It referred to Louisiana, but the amended complaint shows that Louisiana points are not included, and consequently no consideration need be given to the inclusion in this statement of New Orleans, Louisiana.

To northern destinations, such as Cairo, Chicago, and so forth, it will be noted that the rates of the standard trunk lines are usually the same, as previously pointed out; but there are also some differences to this territory in the trunk-line rates, as will be observed from the statement.

151 Further, it will be noted that with the exception of the short lines connecting with the Mobile & Ohio and New Orleans & Northeastern, that to this territory the rates of the short lines are uniformly higher than from the trunk lines.

This exhibit clearly demonstrates that Knoxo, Mississippi, on the Fernwood & Gulf Railroad, is not treated differently, generally, than other points similarly situated; and further proves conclusively that there is no zone or blanket rate adjustment on pine lumber from the Mississippi Valley producing fields by which all points of origin, except Knoxo, Mississippi, to the same destinations take the same rates, but that the rates vary in the manner previously outlined in my testimony.

From the third or eastern group certain of the standard trunk lines have established rates from certain parts of that territory which are, generally speaking, the same as the rates from I. C. and M. & O. stations in the middle group to certain of the Ohio River crossings and to Central Freight Association territory. These rates, however, are not blanketed over the southeastern territory, but apply from certain parts of the territory only; and from many points on their own branch lines, as well as on the small connections of the standard trunk lines in the Southeast, the rates are made

152 differentials or arbitraries higher than the rates from points on the trunk lines. In other words, there is no blanketing of the territory and no fixed rates to any destination which applies from all points in this eastern group.

We frequently refer to this pine-producing section as a pine blanket, and the commission in certain of its cases has referred to it as the pine blanket, but they have called attention, as I will show a little bit later on in my testimony, to the fact that the practices east of the Mississippi River in constructing rates from the pine-producing sections were different at the time they had the matter under consideration and at the time they called it a blanket. In other words, they mentioned specifically the Mississippi Central rates at one time as being higher than the group adjustment; and they have also stated in several cases, as I will point out later on, that the practices of the roads east of the river, from the short roads, was to make the rates either a differential or on combination basis over the junction points; so in fact it is not what you would call a blanket adjustment embracing a segregated part of the territory, or State, or something like that.

Q. You have been dealing with certain characteristics of the rate adjustment on yellow pine lumber from the producing section of the United States to the various destinations. Will you now
153 state what is your purpose in offering this evidence, and what do you consider to be its relevancy to the issues in the instant complaint?

A. This complaint is limited in its scope, being confined to the Fernwood & Gulf Railroad as an originating road; but in principle it involves every similar situation in the pine-producing section of the South. It is therefore necessary to state, briefly at least, some facts concerning the adjustment from the producing fields in order to understand the situation clearly.

My purpose in introducing this testimony is to point out the misunderstanding that exists with respect to the so-called blanket rates on yellow-pine lumber, and to show also that from each of the producing fields, as described, the maintenance of a group adjustment, even from points within that producing section, was dependent upon certain conditions of rate adjustments as between the trunk lines on the one hand and the short railroads or tap lines on the other; and to bring to the attention of the commission certain features of the rate adjustment on yellow-pine lumber which have been dealt with in decisions of the commission itself which will show that the situation presented in this complaint is not a new or unusual situation, but is only one of many, all of which are of long standing and have been previously considered and approved by the commission in
154 important investigations which permitted review of the adjustments from the entire producing section.

Furthermore, to point out that the application of the same rates from points on the Fernwood & Gulf Railroad as from points on the Illinois Central or other trunk lines would be an exception rather than in line with the general basis of rates from points on short lines or tap lines in the pine producing territory east of the Mississippi River.

Q. In that connection, will you refer briefly to some of those decisions?

A. In 1903 the railroads serving the three producing fields or territories that I have described made an advance of 2 cents per hundred pounds in the rates on yellow-pine lumber from the three producing fields to Ohio and Mississippi River crossings, and to Central Freight Association territory, and so forth. This advance was complained of, and investigated by the Interstate Commerce Commission in the following cases:

Central Yellow Pine Association vs. Illinois Central, 10 I. C. C. 505.

Tift vs. Southern Railway Company, 10 I. C. C. 548.

Chicago Lumber & Coal Company vs. Tioga Southeastern Railway, 16 I. C. C. 323.

In the three decisions just named the commission dealt at
155 length with the history of the adjustment of rates from the three producing fields, with the relationship of rates from the three fields, one as compared with the other, and with the groupings of the sections served by the respective fields.

These already being matters of record with the commission, it is not my purpose to detail the history of the changes in rates or other findings of fact which are outlined in the decisions themselves.

By these decisions, however, the commission fixed for the future the relationship of rates from the territories of origin, and for the time being the commission fixed the measure of the rates from these three producing fields to the destinations named. My purpose here is merely to point out certain findings of the commission with respect to the application of the group basis from the three producing sections affected by the decisions, and, as previously stated, to point out that the maintenance of rates from points on the Fernwood & Gulf Railroad higher than from points on the Illinois Central Railroad is in line with the adjustment maintained and approved by the commission, which fixed the adjustment of rates from the various territories of origin to which I have referred.

In the Central Yellow Pine case, involving rates from the
156 middle field or the Mississippi Valley territory, the commission condemned the advance and ordered the restoration of the rates in effect prior to 1903.

In this decision the commission pointed out that in the territory west of the Mississippi River, from which an advance had been made corresponding with the advance from the Mississippi Valley, allowances were made to the so-called tap lines or short connecting railroads of amounts equal to two cents per hundred pounds and over, and that such allowances were not made by carriers east of the Mississippi River, except the Mobile & Ohio and New Orleans & Northeastern. A considerable portion of the decision dealing with the findings of fact and of the conclusions of the commission is devoted to this feature of the adjustment, showing that this point

had important bearing upon the conclusions reached by the commission.

In the Tift case the advance was also condemned, and the commission ordered the restoration of the rates in force prior to 1903. This case involved the adjustment of rates from points in eastern and southern Alabama and the State of Georgia. From this section there was no blanket adjustment. Certain of the larger lines had divided their shipping stations into different groups or rate bases, the rates from these groups differing, being higher from some than from others.

157 By reason of this grouping from many points in the southeastern territory the rates were higher than the rates from the territory west of the Mississippi River or from territory in the Mississippi Valley east of the Mississippi River. The commission's decision shows that they fully understood the adjustment in this section.

In the Chicago Lumber & Coal case, which involved the territory west of the Mississippi River, the commission approved the advance and permitted the increased rates to continue in effect, pointing out the dissimilarity of conditions with respect to the adjustment from the territory west of the river as compared with the two main groups east of the Mississippi River.

In the Chicago Lumber & Coal Company case the commission also pointed out at length as a distinguishing feature, as compared with territory east of the Mississippi River, the fact that the western producing section had been readjusted so as to form one group or blanket, and that reductions as well as advances had been made.

Furthermore, reference was made to the allowances or divisions to the so-called tap lines or logging roads connecting with these roads west of the Mississippi River.

Subsequent decisions of the commission also called attention
158 to this blanketing of the territory west of the Mississippi River, notably in the case of Ladd vs. Gould Southwestern, 36 I. C. C. 179, where the western roads, after having formed the blanket, undertook to treat the Gould Southwestern differently from other short roads in the blanket.

In the territory east of the Mississippi River affected by the decisions referred to, there was no blanketing of the territory so as to cover all of the short or connecting tap line roads, and the commission did not undertake to establish such an adjustment; but, as pointed out, one of the principal reasons why the commission did not allow the advance east of the Mississippi River was because the rates did not include allowances to short or tap lines.

In subsequent decisions, notably those dealing with the tap line investigation, I. & S. 11, 10, 23 and 31 I. C. C. reports, and those dealing with the fourth section, the commission's fourth section order 2754, which permitted the commission to review the adjustment of rates on lumber in connection with the short lines, the commission has not condemned the basis of rates operating east of the

Mississippi River, but has expressly approved the addition of arbitraries to junction-point rates in fixing rates from these short connecting railroads or tap lines, such as the Fernwood & Gulf.

159 There are numerous decisions of the commission dealing with rates on lumber and other commodities from points on short connecting railroads in the southern region in which the commission has approved rates materially higher than those applicable from the junction point with the trunk-line connections.

Q. This part of your evidence, then, shows that in the territory west of the Mississippi River it was and is the policy of the carriers to extend the trunk-line basis of rates to points on short or tap lines. In other words, that there is in effect a blanket adjustment of rates. On the other hand, the carriers east of the Mississippi River, with one or two exceptions, followed the general policy to the contrary, that is to say, they have not applied the trunk-line basis of rates, or the so-called blanket rates, to points on the short or tap lines.

Will you now tell the commission whether or not this subject has been investigated by the commission, and if so, refer briefly to the decision.

A. This situation was before the commission in one of the early tap-line investigations which it made, namely, the Central Yellow Pine Association vs. V. S. & P. Railroad, reported in 10

160 I. C. C. 194. This case was decided about the same time as the three cases involving the rate adjustment on lumber to which I referred in answer to your previous question.

The Central Yellow Pine Association was an association of yellow-pine lumber manufacturers in Mississippi and Alabama. The complaint was directed against the railroads west of the Mississippi River and alleged that while in the territory of the complainant association nothing was allowed by trunk-line carriers to short connecting or tap lines which served mills in the territory east of the Mississippi River, such an allowance was made in the territory west of the river, and that that allowance gave an undue advantage to the mills located in the territory west of the Mississippi River for reasons which were detailed in the complaint and testimony at considerable length.

The commission declined to condemn the practices of the roads west of the Mississippi River, and said, among other things, that as the defendant carriers did not control the rates which competing mills paid, that it could not be said that they discriminated against them.

The date of the decision just referred to was March 19, 1904. The Central Yellow Pine Lumber case was decided February 7,

161 1905. Tift vs. Southern Railway was decided February 7, 1905. The former case involved the question of discriminations growing out of the extension of the trunk-line rates to short or tap lines west of the Mississippi River, while with one exception the roads east of the river had declined to establish similar adjustments. The two latter decisions referred to the propriety of cer-

tain advances in rates from points on railroads in the territory east of the Mississippi River, which were the same in amount and were advanced at the same time as rates from points on railroads located west of the Mississippi River.

The commission had before it the record in the three cases at the same time.

I have prepared an exhibit, which I will now offer as my Exhibit No. 3.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 3, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This exhibit contains the expressions of the commission with respect to this particular policy of the carriers in the three lumber-producing fields. From the reading of these decisions it is quite clear that the commission fully understood the adjustment of rates from points on the Fernwood & Gulf Railroad
162 and other similar railroads operating in the middle group, and that the commission was not prepared to order reductions in the rates from points on such roads as the Fernwood & Gulf to the trunk line or junction point basis.

It must be borne in mind that the three decisions, namely, the Central Yellow Pine case, Tift case, and the Chicago Lumber & Coal case, were controlling as to the measure of the rates and the relative adjustment interterritorially as well as locally on yellow pine lumber from the three producing fields to the Ohio and Mississippi River crossings and to Central Freight Association territory. This was the important consuming territory, and, as I have heretofore stated, was the only territory as to which there was a fixed relative adjustment or relation of rates from the entire yellow pine producing fields.

I also wish to offer at this time my Exhibit No. 4.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 4, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This exhibit contains extracts from decisions of the commission which were subsequent to the decisions I have referred to, one excerpt being from I. & S. Docket 11, decided July 29, 1914.

Q. (By Mr. HUMBURG.) And reported where?

A. And reported in 31 I. C. C. 490, wherein the commission
163 fixed the rates and divisions from certain short roads; and the other from fourth section Order No. 2754, wherein the commission after being fully advised as to the fourth section departures occurring in the operations of higher rates from points on the short line than from intermediate points—that is to say, those instances where the short line met the junction point rate and handled it through another junction—the commission granted fourth section relief.

I call particular attention at this time to the last sentence quoted from I. & S. 11, wherein the commission said that the divisions as named in their order were the net amounts that could be paid out of the trunk line rates from the junctions, and when the rates from the tap lines were made by the application of an arbitrary, such arbitrary should accrue to the tap line, indicating clearly that the commission was advised as to the general situation.

In none of these general investigations made by the commission has it indicated that the adjustments were not proper, and that the rates from the territory as a whole should be blanketed; but, on the contrary, it has specifically referred to the rates from the short roads as being higher than from the junctions.

164 Q. You have stated that the general practice of the Illinois Central Railroad and other railroads east of the Mississippi River, except the Mobile & Ohio and the New Orleans & Northeastern, was to not apply the trunk line basis of rates from points on connecting or tap lines, but that, on the contrary, such rates were to be made either on combination basis or by adding certain differentials or arbitraries to the junction point rates.

Will you now tell what effect the attitude of the Mobile & Ohio Railroad, and of the New Orleans and Northeastern Railroad has had upon the rate adjustment from the producing territory in Mississippi and eastern Louisiana; and what action, if any, the Illinois Central Railroad has been compelled to take because of this policy of those two roads, which policy you say is contrary to that of other carriers east of the Mississippi River?

A. The Mobile & Ohio Railroad and the New Orleans & Northeastern Railroad served practically the same producing sections in southern Mississippi and eastern Louisiana as did the Illinois Central. The distance between the three roads is short. The Illinois Central has therefore been compelled by the action of the two roads named to depart to an extent from its original policy of not extending the same basis or the same rates as carried from its

165 own stations, to points on the connecting or tap lines.

As to the independent railroads other than the Illinois Central, Mobile & Ohio, and New Orleans & Northeastern serving this southern Mississippi and eastern Louisiana pine producing territory, all are located in the territory between the I. C. on the west and the M. & O. on the east. Those lines were constructed northward from the Gulf to connections with the New Orleans & Northeastern and Mobile & Ohio before reaching connections with the I. C. Therefore, before the connection was made with the I. C. rates had already been established in connection with the New Orleans and Mobile & Ohio Railroads, and this determined the rates which the I. C. Railroad was compelled to meet.

For example, the Gulf & Ship Island, G. M. & N., and G. O. G. N. were connections of the Northeastern and Mobile & Ohio, and had established a rate adjustment on yellow pine lumber before connection was made with the Illinois Central Railroad. The Mississippi

Central Railroad is an east and west road, but it was constructed from Hattiesburg, and its connection with the New Orleans & Northeastern westward to the I. C. Railroad, and the adjustment of rates on yellow pine lumber, had been fixed before the connection with the Illinois Central Railroad was made.

166 The Illinois Central Railroad was therefore compelled to apply no higher rates from points on these railroads than had been established by such roads in connection with the New Orleans & Northeastern and Mobile & Ohio Railroads.

There was, however, another class of railroads connecting with the Illinois Central which did not connect with the New Orleans & Northeastern or the Mobile & Ohio. Practically all of these roads were what is known as tap lines, having been constructed by proprietary mill interests for logging purposes. As is customary with such lines, they also engaged in the general handling of freight for the public.

The Illinois Central has followed its general policy of applying combination rates from points on roads of this class. It furthermore declined to allow them any divisions or proportions on lumber shipped by the proprietary mill interests located at the junction point of the Illinois Central and the tap lines.

This policy, as I have previously pointed out, was directly contrary to that of the railroads operating west of the Mississippi River, which made such divisions or allowances to the so-called tap lines. It was,

167 however, the same as the Illinois Central Railroad understood to be the policy of all carriers located in the yellow pine producing territory of the Mississippi River.

The Illinois Central was not advised that the Mobile & Ohio and New Orleans & Northeastern had departed from this general policy of the southern carriers until the information was disclosed in the investigations of the commission in the Central Yellow Pine and Tift cases. Having learned from these investigations that such divisions or allowances were being made to the short or tap lines connecting with the M. & O. and New Orleans & Northeastern Railroad, and those lines being unwilling to discontinue such allowances, the Illinois Central Railroad felt compelled to remove at least in part the disadvantages of its mills and tap lines which were located in the same general territory as those mills on the lines of the New Orleans & Northeastern and Mobile & Ohio.

It accordingly, in 1906——

Q. By "it" you mean the Illinois Central?

A. Yes, "it," meaning the Illinois Central, accordingly in 1906, accorded all tap line roads which connected with it, of which the Fernwood & Gulf was one, a basis of rates and divisions by which through rates were established from points on the tap lines to certain destinations, thus affording a basis of rates and divisions.

168 The Illinois Central did not, however, shrink its rates to the extent of the maximum shrinkages made by either the M. & O. or New Orleans & Northeastern roads, nor did it require that

the same rates be published from points on the tap lines as applied from the junction point or other I. C. Railroad stations, but it allowed the originating roads to voluntarily fix rates from their stations.

The tap lines or short lines fixed the measure of the rates or differentials to be added to make the rates from their stations, and they also fixed such grouping as they were to observe on their own railroad.

The arbitrary or differentials accrued entirely to the tap line from the time it was first put on, and was in addition to the shrinkage the Illinois Central Railroad agreed to make in its rates from the junction point.

This concession by the Illinois Central was made nothwithstanding the fact that the commission in cases heretofore mentioned had not condemned the combination basis then maintained from points on these tap lines, including the Fernwood & Gulf.

The shrinkage in the junction point rates was not made to all destinations, but was confined to destinations competitive with the Mobile & Ohio and New Orleans & Northeastern Railroads;
169 and was further limited by the measure of the revenue which the Illinois Central itself received out of the traffic, and which in many instances was too low to permit of shrinkage.

Thus the rates were originally established to Ohio and Mississippi River crossings and the territory basing thereon, including the Central Freight Association territory, and later the eastern trunk-line territory was included. To other territories, for example, points in Louisiana, Alabama, Tennessee, and Georgia, except in a few instances such as Memphis and New Orleans, there were no shrinkages, however, for the reason that such territories were not competitive with the two roads mentioned, or that the Illinois Central's revenues were too low to permit of shrinkage to meet the competition.

In other words, Mr. Examiner, when it got to this southern territory, such as points like Chattanooga, Tennessee; Atlanta, Georgia; Birmingham, Alabama; and points like that, they were located in the pine-producing territory themselves, and the competition was not between the Mobile & Ohio and the Illinois Central, but was with the territories in the Southeast, and frequently we could not meet the rates from those short roads.

Q. In thus meeting the practice of the Mobile & Ohio and the New Orleans & Northeastern railroads, by the establishment
170 of these joint through rates and divisions with its short connections or tap lines, so called, will you state whether or not the position of the Illinois Central was consistent as between the various short lines and tap lines with which it connected in that practice?

A. When the Illinois Central Railroad decided to extend the basis of rates as outlined to its short-line connections, all were treated the same; that is to say, all its tap-line connections were advised of

its purpose, of the amount of shrinkages in the junction-point rate which it was prepared to make, and of the destinations to which such shrinkages would apply. Rates and divisions were thus negotiated and established by all of these tap lines which felt disposed to incorporate as common carriers and to establish the basis of rates determined upon.

The position of the Illinois Central Railroad has been consistently maintained, as will be seen from an examination of a statement which I now offer in evidence as my Exhibit No. 5.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 5, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This statement contains a list of all of the incorporated short or tap lines with which the Illinois Central and
171 Yazoo & Mississippi Valley connect in the pine-producing territory, except the Batesville & Southwestern and Sardis & Delta Railroads, which railroads are located in the hardwood-producing section.

The exhibit is in two pages, the first page showing the basis for rates to Ohio River crossings and territory beyond, and the second a blue print showing the location of the various railroads.

As heretofore stated, the arbitrary or differential added to the junction-point rate to establish through rates from points on these short or tap lines was fixed by such lines and accrues to such lines in addition to the shrinkages in the junction-point rates made by the Illinois Central Railroad, which latter company and its connections receive no part of the arbitrary or differential.

It will therefore be seen that the situation here is entirely different from the case of Ladd vs. Gould Southwestern. First, there was no blanket; and second, one short road was not treated different from another, but in all cases the short roads were treated alike.

Furthermore, it will be noted that the Illinois Central Railroad did not fix the measure of the rates from the short roads, thereby compelling them to carry higher rates from their stations, but permitted the short roads to fix the measure of their rates.
172 Therefore it can not be properly charged that the Illinois Central has discriminated, as it did not control nor was it benefitted by the measure of the rates established. Certainly the short roads can not be properly charged with discrimination because they merely fixed the measure of their rates and compensation, and did not participate in the handling of traffic except from their own stations.

The measure of differentials, it will be observed, vary as do the local rates on the various lines, and were fixed by the traffic officials of the short roads to meet the conditions peculiar to each road.

Q. Having explained the conditions which prompted the Illinois Central to depart from the combination basis and establish joint through rates with these short or tap lines with which it connected, and that such change of policy on the part of the Illinois Central

Railroad was made because of disclosures in the Central Yellow Pine investigation of the action of its competitors, the Mobile & Ohio Railroad and the New Orleans & Northeastern Railroad, and that such action by the Illinois Central was taken in 1906, will you tell what further developments of this situation have occurred since 1906, and what action, if any, was taken by the Illinois Central because of such developments?

173 A. All of the carriers shown on my Exhibit No. 5 were originally tap lines. That is to say, they were built by or in the interest of proprietary lumber mills and had for their original purpose the bringing of logs to the mills, and many of them are still engaged in the handling of such traffic.

The more important of these roads, including the Fernwood & Gulf Railroad, were the subject of investigation by the Interstate Commerce Commission in the Tap Line cases, reported in 23 and 31 I. C. C. Reports. In those decisions the commission fixed the maximum shrinkages in trunk-line revenues that might be made out of the junction-point rate on lumber originating on these tap lines.

Following the commission's decision, the Illinois Central Railroad revised its tariffs to conform strictly to the commission's orders; that is to say, the shrinkages in its junction-point rates were made not to exceed the amounts fixed by the commission as the maximum which could be absorbed out of the junction-point rate.

In the decision referred to in the Tap Line case and in the excerpts which I offered as my Exhibit No. 4 the commission called attention to the fact that the rates from certain of these tap lines exceeded the rates from the I. C. Railroad junctions, and that such arbi-

174 trary or differential over the junction-point rate should accrue to the short line in addition to the shrinkage which the commission had approved. The arbitrary added to the rates in all instances accrues to the originating road in addition to the shrinkage made by the Illinois Central Railroad, which is strictly in accordance with the commission's decision, and I call particular attention here to the fact that the commission very carefully in the Tap Line case did not fix the amount of divisions to be accorded to the tap line, but fixed the maximum amount which the trunk lines could shrink.

Q. Your Exhibit No. 5 shows that the rates on pine lumber from short-line connections of the Illinois Central are made differentials over the trunk-line rates. Will you tell whether or not there are any mills located on those lines and whether or not there is actual movement of forest products on the basis shown, meaning the junction-point rates plus the arbitraries mentioned?

A. Traffic is handled from practically all of the short-line connections in considerable volume. There are instances where lumber mills are not located on the short lines, but from such roads crossties, piling, and other articles which take the lumber rates are handled on the basis of rates made differentials over the junction-point rate.

175 Frequently small or country mills cut considerable tonnage and then discontinue operation. I have made an investigation recently for the purpose of determining whether there was actual movement of traffic, which developed the following:

From the Kosciusko & Southeastern Railroad, which connects with our road at Kosciusko, Mississippi, on the Aberdeen branch, there is a movement of about seventy carloads of lumber per month, sixty carloads consisting of pine. The largest sawmill is located at Zama, Mississippi, handling pine lumber exclusively, and it has a capacity of 90,000 feet per day. This road's arbitrary over the main-line junction is 2½ cents per hundred pounds.

However, Mr. Examiner, from that Aberdeen district of ours, our rates on pine lumber are one cent less than from the pine-producing territory, so as an actual result the Kosciusko & Southeastern is 1½ cents over the blanket rate.

The Liberty White Railroad has three mills, two of which are located at Liberty, Mississippi, and one at Felder, Mississippi, capacity about 25,000 feet per day each. Two of these mills have been shipping about ten cars per month. The third is a new mill and will be shipping soon. There is also a considerable quantity
176 of crossties moved off this road, which are handled on the lumber rates but are not manufactured by the sawmills mentioned.

Right here, Mr. Examiner, I want to call attention to the fact that the Liberty White Railroad, as shown on the blue print attached to Exhibit No. 5, extends only to the west of the Illinois Central Railroad. It formerly had a line extending east, from McComb to Tylertown, Mississippi, which it had taken up on account of the timber being cut off in this section of the country, and which is frequently the case with these short roads.

On the Kentwood & Eastern Railroad there is a large sawmill located at Madisonville, Louisiana, having a capacity of 40,000 feet per day, which is shipping on an average of thirty cars of pine lumber per month. The Kentwood & Eastern Railroad formerly had a narrow-gauge railroad extending toward and connecting with the N. O. G. N. Railroad at Warnerton, Louisiana, and because of the fact that the timber has been cut out along this railroad it has been torn up, as is the general practice on these short logging roads.

From this narrow-gauge section of the Kentwood & Eastern the rates were formerly 1½ cents over the main-line junction, and in addition there was a transfer charge at Kentwood from the
177 narrow-gauge to standard-gauge cars of 50 cents per thousand feet, as will be shown by the tariffs in effect at that time.

On the N. C. & M. Railroad——

Q. What is that road?

A. Natchez, Columbia & Mobile, extending from Norfield, Mississippi, on the Illinois Central, to Tilton, Mississippi, on the New Orleans Great Northern.

On this line there are two mills, one located at Sauls, Mississippi, and the other at Bristerville, Mississippi, having a capacity of about 10,000 feet per day. These mills are shipping about eight cars of pine lumber per month.

There are no sawmills located on the New Orleans, Natalbany & Natchez Railroad, which connects with our railroad at Natalbany; nor are there any mills located on the Kentwood, Greensburg & Southwestern Railroad, which connects with our road at Kent's mill, just south of Kentwood. There were formerly mills located on these roads, but I am informed that they have cut out and been dismantled, and to a large extent the timber of the proprietary mills has been cut out. There is, however, considerable movement of crossties from points on these roads, which is handled on the lumber rate; the movement from the K. C. & S. W. amounting to about ten cars per month, and from the N. O. G. N. stations
178 about eight cars per month.

On the Garyville Northern there is a pine mill located at Frost, Louisiana, but I am not advised as to what the movement from this mill amounts to.

The foregoing covers all of the roads in the pine-producing territory. There is also the Batesville Southwestern, which is in the hardwood-producing territory, from which the rates are constructed on a basis similar to that operated in the pine-producing territory; and on this road there are four mills located, shipping about 60 cars per month of forest products, consisting of lumber, staves and headings, and other articles taking the lumber rate.

Mr. PALMER. I didn't catch on what road that was.

The WITNESS. Batesville Southwestern. I made the point that that was in the hardwood territory, but that we observed the same basis of constructing rates there.

What I have said clearly demonstrates that the bases mentioned are not paper bases but are actually working bases on which considerable tonnage is handled.

While I have Exhibit No. 5 before me I would like to call attention to the blue print, which shows that the only two short-line connections of the N. O. G. N. Railroad are the N. C. & M. and the Fernwood & Gulf Railroad, both of which railroads also
179 connect with the Illinois Central Railroad, and the adjustment of rates from these short roads was fixed by the Illinois Central before the N. O. C. N. reached the junction point.

Q. (By Mr. HUMBURG.) Briefly stated, what is the history of the rates on yellow-pine number from the Fernwood & Gulf Railroad stations to points reached by the Illinois Central?

A. Prior to May 21, 1906, no through rates were published on yellow-pine lumber from points on the Fernwood & Gulf Railroad. On such traffic as moved, combination of locals applied.

Following advice to our short-line connections, including the Fernwood & Gulf Railroad with respect to shrinkages, we were prepared to make in rates from our junction points to certain destinations,

namely, Ohio River crossings and related points and points beyond, the Fernwood & Gulf Railroad published, to take effect on the date mentioned, in their I. C. C. No. 1–1, rates on basis of 2 cents per hundred pounds higher than from Fernwood. Later this basis was incorporated in the tariffs issued by the Illinois Central Railroad, and in tariffs issued by certain agents for the account of the originating road.

Rates were subsequently established to eastern trunk-line
180 territory on the same basis, 2 cents per hundred pounds over Fernwood.

To Memphis and New Orleans through rates were also established, which were 2 cents per hundred pounds higher than from Fernwood; and in the latter instances rates resulted which were the same as from Tylertown, Mississippi, and points on the N. O. G. N. Railroad in that vicinity. However, in making the rates they were 2 cents over the Illinois Central junctions.

The rates originally published to Ohio River crossings were subsequently extended to apply to intermediate points on the Illinois Central in Kentucky and Tennessee, usually taking the Ohio River basis, because the Interstate Commerce Commission in fo'rth section order 2754, I think it was, although I am not sure as to the order number, denied fourth section relief at the Ohio River crossings.

Subsequent to the establishment of rates to Ohio River crossings and eastern trunk-line points on the basis outlined, the N. O. G. N. Railroad was extended to Tylertown. Because of the N. O. G. N. adjustment the Fernwood & Gulf Railroad found it necessary, in order to meet the competition of the N. O. G. N at Tylertown, to reduce the rates via its road to the same as had been established by the New Orleans Great Northern Railroad from Tylertown to the
181 consuming territory. Therefore these rates were reduced 2 cents per hundred pounds. In other words, the two-cent differential over Fernwood was eliminated, and the reduction was made out of the Fernwood & Gulf earnings. That is to say, the Fernwood & Gulf found it necessary because of this competition to reduce its earnings on Tylertown traffic.

Between points in Mississippi the Mississippi Railroad Commission has fixed a general basis for two-line rates which is combination using the local of each road, less a percentage reduction in each road's local rates, which is accomplished in Mississippi by publishing what they call double B rates.

This basis is applied almost universally throughout the State of Mississippi, and, as previously stated, was fixed and approved by the Mississippi Railroad Commission. I understand there is no attack in this proceeding on the rates to Mississippi destinations, but I call particular attention here to the basis which has been fixed by the Mississippi Railroad Commission in that State, where they are in close touch with the situation in the territory we are discussing.

To other destinations, that is, points in Tennessee other than Memphis, and points on the I. C. Railroad in Alabama and other States not embraced in the so-called shrinkage territory, the
182 original basis has continued, i. e., combination. The movement to the last-named destinations from the trunk-line points as well as from the short-line points is insignificant, because these consuming points, as we previously pointed out, are located in another pine-producing territory or adjacent thereto.

The rates from points on the Fernwood & Gulf Railroad have continued on the original basis, such changes as were made being only those caused by General Order No. 28 of the Director General of Railroads, known commonly as the 25-per-cent advance. The order prescribed a maximum increase of 5 cents per one hundred pounds, and in instances where the rates were 20 cents or more the maximum was applied, and the 25 per cent did not affect the arbitrary. That accounts for the fact of there being in some instances a two-cent differential and in other instances a 2½-cent differential.

As previously pointed out the arbitrary added to the rate accrues to the originating road, and the Illinois Central Railroad receives no portion of it.

Q. Have you made any analysis of the movement of lumber from the complainant's mill at Knoxo to various destinations for a given period, and if so, will you tell what it shows, in order that the commission may have an idea of the trend and volume of the traffic involved?

183 A. I have prepared such a statement which I will offer in evidence as my Exhibit No. 6.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 6, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This statement shows the total movement of lumber from the Swift Lumber Company, Knoxo, via Fernwood & Gulf, in connection with the Illinois Central and the N. O. G. N. for a period from January 1st to August 31st, 1919.

It will be observed there are 273 cars which were handled during the period mentioned from all destinations, and on the basis I have outlined as to the rates. It will be noted that practically all of the movement is to points to which the differential basis applies, or to which the Mississippi Railroad Commission has fixed a basis, there being only a few cars to other destinations.

This movement is typical of the movement from the territory generally, including points on the trunk lines, for the reasons I have previously explained.

Q. (By Mr. HUMBURG.) You have given the history of the rates from points on the Fernwood & Gulf Railroad. You have also filed an exhibit showing the adjustment maintained at the present
184 time from all of the other short lines with which the Illinois Central connects in the yellow pine territory it serves. Is the history of the rates from these other lines shown in your Exhibit

No. 5 the same as that of the rates from points on the Fernwood & Gulf, differing only as to dates upon which the rates were established, the latter depending upon the date of incorporation or construction of the short lines?

A. The history of the rates operated in connection with these short roads is exactly the same as what I have just detailed with respect to the history of the Fernwood & Gulf Railroad. Some of the roads were not incorporated on the same date as the Fernwood & Gulf, while others were not constructed until some time after the rates were established in connection with the Fernwood & Gulf, and therefore the dates upon which the rates were made effective are not the same.

However, the position of the I. C. Railroad has been consistent, in that it has accorded to each of its short or tap line connections in the yellow pine territory the same treatment in the matter of establishing rates and divisions. Its position is also consistent with its policy, established many years ago, of not applying from these mills the same rates as from its own stations, except where compelled by competition to do so.

185 Q. If the commission should now hold that the rates from points on the Fernwood & Gulf must be the same as from Fernwood or from Tylertown, the junction points with the Illinois Central and the New Orleans Great Northern, respectively, what would be the effect upon the other roads' rates shown in Exhibit No. 5, or what would be the effect upon the rates from points on the other roads shown in Exhibit No. 5?

A. If the rates from the Fernwood & Gulf Railroad are reduced to the basis applicable from the trunk-line junctions, I do not see how it would be practicable to defend a higher basis from points on the other roads shown on my exhibits. In all instances, as I have heretofore explained, the arbitrary or differential accrues to the originating road and is in addition to the shrinkage made by the trunk line in its junction-point rate. There seems to be no justification for such reductions in the revenues of these lines. Many of the roads shown on this exhibit are tap lines, and the amount of shrinkage in the trunk-line rates is limited by the commission in its tap-line decision, so that the trunk lines themselves would be unable to come to the assistance of these short lines by increased divisions even if the trunk line were so disposed.

186 Furthermore, as I will show by another exhibit, the general basis of rates on lumber from these short lines in the South is either combinations or differentials over the trunk-line junction points, and the application of the junction-point basis from points on the short lines is exceptional rather than in line with the usual practice.

Q. Will you state whether or not the practice of applying on lumber such differentials over the junction-point rate is peculiar to the Illinois Central and its connections or is this basis observed quite generally in the lumber producing section?

A. The practice of making rates on lumber from the short lines on the basis of differentials over the trunk-line junction is not peculiar to the connections of the Illinois Central Railroad, but is observed quite generally in the lumber-producing section.

I have prepared a statement, which I now offer as my Exhibit No. 7, in that connection.

(The document was thereupon received in evidence, marked "Defendant's Exhibit No. 7, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This exhibit shows a number of instances east of the Mississippi River, as well as west of the Mississippi River, where rates are made on differentials over the junction-point rates.

187 I have made an investigation as to the movement from those roads and find that considerable traffic is handled on basis of the rates as established by the use of the differentials shown in the statement.

Q. (By Mr. HUMBURG.) Your Exhibit No. 7 shows the basis for rates on lumber for roads west of the river as well as for roads east of the river. What can you say as to the basis and the attitude of carriers in this southern region, except the Mobile & Ohio and the New Orleans & Northeastern, with respect to bases and adjustment of rates with short line connections, including tap lines?

A. I have prepared another statement which I will offer as my Exhibit No. 8.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 8, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This statement shows the basis for rates to Ohio River crossings and Central Freight Association points from practically every short railroad in the State of Louisiana east of the Mississippi River, Mississippi, Alabama, Florida, and other States embraced in the southern region. These are all lines of less than one hundred miles in length.

It will be observed from the statement, and particularly the

188 recapitulation on the last page, that there are 95 of these short roads, of which the rates from 55 are made differentials over the junction point; 27 are on combination basis; and only 13 in the entire region are on the junction point basis.

Q. (By Mr. HUMBURG.) Do I understand you correctly in saying that this embraces the entire southeastern territory south of the Ohio and east of the Mississippi?

A. That is correct; it was made up for the purpose of embracing all of the short roads in the southern region.

I would like to call you attention to a few of the instances shown on the exhibits. For example, in the State of Louisiana, which is in the territory served by our road, there are five short railroads, all of which are made differentials over the junction points.

In Mississippi, which is shown immediately following Louisiana, there are twelve roads, one being on combination, five on differential basis, and six on junction point basis. It will be noted that five of those having junction point basis in Mississippi connect with the M. & O., or New Orleans & Northeastern, whose policies have always been different from those of the roads in the territory generally, and whose policies are not controlled by the Illinois Central, the N. O. G. N., or the Fernwood & Gulf Railroad.

189 The Mississippi Western Railroad, the other road in Mississippi having the junction point basis, connects with the Gulf, Mobile & Northern. This road is owned or controlled by the same interests as the Fouke Lumber Company, whose mill is located at Fouke, Mississippi, the terminus of the Mississippi Western Railroad. I understand that this road accepts for its services proportions resulting from the tap line shrinkage as provided in the commission's I. & S. 11 decision, and no doubt this is accounted for by the relationship in interest between the lumber company and the railroad.

The Jackson & Eastern Railroad was formerly operated as part of the Meridian & Memphis Railroad, which connected with the Mobile & Ohio at Meridian, and its basis of rates was established at the time the connection was made with the Mobile & Ohio; or, I should say, at the time the Meridian & Memphis rates were established.

In the State of Alabama, which is next to Mississippi, and which is shown on the first page of the exhibit, it will be noted that there are thirteen of these short roads, of which two are on combination; ten on differential basis; and one only on the junction-point basis.

The road having the junction-point basis is a connection of the Mobile & Ohio Railroad.

190 In Georgia there are twenty-three short roads, three of which are on combination; nineteen on differential basis; and one on the junction-point basis. The one road on the junction-point basis is the Sandersville Railway, which serves Sandersville, Georgia, having rails from that point to Tennille, Georgia, about five miles distant. The only point it serves is Sandersville and Tennille, and necessarily it must make the same rates from those junctions as are made by the trunk lines. Otherwise they would receive no traffic whatever.

It is unnecessary, I think, to point out the number of roads in each State, but the exhibit is very clear, and it will be seen clearly that the application of the junction-point basis from the short road is exceptional rather than the rule; and as I have previously pointed out, we have made an investigation as to quite a few of the roads, and especially all of those shown on Exhibit 7, and find that there is considerable tonnage handled on the differential basis.

Q. Is lumber treated differently from other traffic with respect to the plussing of the junction-point rates from and to the points on the

short lines in Mississippi and elsewhere in the southeastern territory?

A. No; the same basis is applied on other classes and commodities. That is, either differential or combination basis.

191 Q. Do you now speak of the Fernwood & Gulf, or the roads generally?

A. I am speaking of all of the roads, and with respect to the Fernwood & Gulf Railroad I wish to offer at this time a statement as my Exhibit No. 9.

(The document was thereupon received in evidence, marked "Defendant's Exhibit No. 9, Witness Sheppard," and is forwarded herewith.)

The WITNESS. This statement shows rates on classes and representative commodities to Knoxo, Mississippi, as compared with rates to Fernwood, Mississippi, the trunk-line junction.

This exhibit is illustrative of similar adjustments in connection with other short roads in the southern territory. The class and commodity adjustment was investigated by the Interstate Commerce Commission in connection with the carriers' petitions for relief from the application of the fourth section in the Southeast, and the commission did not condemn the basis but granted fourth section relief under fourth section Order No. 3866, 30 I. C. C. 153, 32 I. C. C. 61, decided April 13, 1914.

Q. What is the history of the rates from points on the Mississippi Central Railroad to the destinations here involved?

192 A. The Mississippi Central Railroad was formerly the Pearl & Leaf River Railroad, which extended from Hattiesburg, Mississippi, to the Pearl River. I have not the date of the original construction, but it was in the latter part of the 90's, somewhere between 1895 and 1900. It connected only with the lines serving Hattiesburg, which were the N. O. & N. E., G. & S. I., and G. M. & N., which was formerly the Mobile, Jackson & Kansas City Railroad.

Rates on pine lumber and articles taking the same rates were, according to our records, originally issued in connection with this road by the New Orleans & Northeastern Railroad on basis of 2 cents per hundred pounds higher than from Hattiesburg, as will be noted by reference to N. O. & N. E. Tariff 640–A, effective November 18, 1903, filed with the Interstate Commerce Commission under Mississippi Central Railroad I. C. C. No. 40.

The G. & S. I. Railroad operated at the time from Hattiesburg to Jackson, Mississippi, and on January 17, 1904, the I. C. Railroad and G. & S. I. joined the Mississippi Central in operating through Jackson the same basis of rates as had been established via the N. O. & N. E. Railroad, i. e., 2 cents per one hundred pounds over Hattiesburg, as will be noted by reference to Supplement 37 to I. C. Railroad Tariff, I. C. C. 1850.

193 The commission was advised as to the basis from the Mississippi Central Railroad in the Central Yellow Pine case, and they did not require any change in the relationship.

Effective August 10, 1904, in supplement 12 to New Orleans & Northeastern Tariff 640–A, Mississippi Central I. C. C. No. 40, the New Orleans & Northeastern Railroad reduced the rates from Mississippi Central stations to the Hattiesburg basis. Following this reduction by the New Orleans & Northeastern Railroad, the Gulf & Ship Island, and Illinois Central, operating through Jackson and Hattiesburg, Mississippi, met the rates established by the New Orleans & Northeastern Railroad, this basis having become effective via the Gulf & Ship Island and Illinois Central on August 31, 1904, as will be noted by reference to Supplement No. 63 to Illinois Central Tariff I. C. C. 1850.

On June 10, 1906, the Mississippi Central Railroad made a direct connection with the Illinois Central at Brookhaven, and the same basis was applied via Brookhaven as via Hattiesburg and the New Orleans & Northeastern Railroad, this being necessary to keep the Brookhaven route on a parity with the route in connection with the New Orleans & Northeastern. The line was subsequently ex-
194 tended to Natchez, connecting with the Missouri Pacific Railway at that point, as well as with the Y. & M. V.

The connection with the New Orleans Great Northern and Mississippi Central was not made until the New Orleans Great Northern was constructed, which was subsequent to the extension of the Mississippi Central to Brookhaven, and, to be exact, in the early part of 1909.

It will therefore be seen that the basis for rates from Mississippi Central stations was fixed before the Illinois Central or the New Orleans Great Northern had any connection with that line. In establishing rates in connection with the Mississippi Central Railroad, the Illinois Central and the New Orleans Great Northern Railroads were merely meeting the rates already available in connection with their competitors, they being in no wise responsible for the adjustment on the Mississippi Central Railroad.

Q. Was or is the Illinois Central Railroad responsible for the adjustment of rates on lumber from points on the Mississippi Central Railroad, and does the Illinois Central Railroad, the New Orleans Great Northern, or the Fernwood & Gulf Railroad, control the Mississippi Central Railroad in the making of its rates?

A. As I have heretofore stated, the Mississippi Central Railroad was constructed from a connection with the New Orleans &
195 Northeastern at Hattiesburg westward to a connection with the Illinois Central Railroad at Brookhaven, and was subsequently extended to its present western terminus at Natchez, Mississippi.

As shown by the history, the basis of making rates from Mississippi Central stations, the same as from points on the New Orleans & Northeastern, had been established and was in effect before the

Mississippi Central was constructed to its connection with the Illinois Central Railroad at Brookhaven. The Illinois Central Railroad of necessity had to meet these rates in order to participate in traffic originating on the Mississippi Central. It had no voice, however, in determining the basis applied from points on this line, as this had been established before connection between the two companies was made.

As further demonstrating that the Illinois Central, New Orleans Great Northern, and Fernwood & Gulf do not control the Mississippi Central in the making of its rates, I call attention to Mississippi Central Tariff 877–B, I. C. C. No. 368, containing rates on canned goods from Hattiesburg, Mississippi, and Brookhaven, Mississippi, to various destinations in the North and West. Neither the Illinois Central, the New Orleans Great Northern, or the Fernwood and Gulf are parties to this tariff. Therefore they do not
196 participate in the rates named therein.

Brookhaven, one of the points of origin shown in the tariff, is a junction point with the Illinois Central, and notwithstanding the fact that the Illinois Central held different views from the Mississippi Central with respect to rates from Brookhaven, the Mississippi Central Railroad published the rates and are maintaining from Brookhaven to-day lower rates than carried on canned goods by the Illinois Central.

The Mississippi Central in Tariff 6–K, I. C. C. No. 364, applying on lumber from Mississippi Central stations to New Orleans, publishes lower rates in connection with the N. O. & N. E. and N. O. G. N. than are provided from the same stations to New Orleans in connection with the Illinois Central Railroad, as shown by reference to Mississippi Central Tariff 598–B, I. C. C. 361.

The Fernwood & Gulf Railroad is not a party to either tariff.

In Agent Speiden's Tariff, I. C. C. 193, and in Illinois Central Tariff, I. C. C. 5642, rates are provided to Covington, Kentucky, and Bowling Green, Kentucky, via the N. O. & N. E. and I. C. Railroads, the rate to Covington via the N. O. & N. E. being 25½ cents and via the I. C. Railroad 28 cents per hundred pounds.
197 To Bowling Green the rate via the N. O. & N. E. is 24 cents and via the Illinois Central is 28 cents per hundred pounds.

In Southern Railway Tariff, I. C. C. No. 2855, rates are provided on pine lumber from Mississippi Central stations as follows:

To Chattanooga, Tennessee, 17½ cents.

To Knoxville, Tennessee, 21½ cents.

To Allen, North Carolina, 31 cents.

No through rates are published in connection with the Illinois Central Railroad from Mississippi Central stations. Many other illustrations of like character could be given, but I believe these are sufficient to demonstrate that the Illinois Central Railroad, the New Orleans Great Northern, and the Fernwood & Gulf do not control the Mississippi Central in its rate-making.

Attention is directed to the routing instructions as provided in connection with rates on lumber from Mississippi Central Railroad stations to Central Freight Association points, as published in Agent Speiden's Middle States Lumber Tariff 2, I. C. C. No. 159, and for the purpose of showing the routes as provided in this tariff I offer at this time a statement which is my Exhibit No. 10.

(The document was thereupon received in evidence, marked
198 "Defendant's Exhibit No. 10, Witness Sheppard," and is forwarded herewith.)

The WITNESS. From this exhibit it will be noted that there are specified in the tariff only three routes via the Illinois Central Railroad, six via the New Orleans Great Northern, and none in connection with the Fernwood & Gulf Railway, leaving thirty-two other available routes from Mississippi Central stations to Central Freight Association territory, covered by this tariff. The Mississippi Central's business to other territory is handled largely via the same routes, except that in addition to western destinations they handle considerable business via Natchez and the Missouri Pacific. It is obvious that the Illinois Central, New Orleans Great Northern, and Fernwood & Gulf Railroads have no control over the Mississippi Central Railroad in the making of its rates or the routing of its traffic.

Q. Has there been any change in the policy or the views of the Illinois Central Railroad with respect to the maintenance of rates on trunk-line basis from points on connecting or short-tap lines since these rates were originally established, or since the hearing of the Yellow Pine case in 1903, and by these rates is meant the rates here assailed?

A. As I stated before, the views of the Illinois Central are
199 the same now as they were formerly. It was compelled, however, to establish in certain instances rates contrary to its views and policy by reason of the action of its competitors, the Mobile & Ohio and New Orleans & Northeastern Railroad; but it has maintained throughout a consistent and nondiscriminatory basis. That is, we have treated all of our short roads exactly alike; we have permitted them to make their rates, and whatever accrued over the junction-point rate has accrued to the short road.

Q. Does the Illinois Central, the New Orleans Great Northern, or the Fernwood & Gulf, or either of them, connect with the Cybur, Gulf & Northwestern Railroad, and do they or either of them in any wise control the making of the rates on yellow pine lumber from points on that road?

A. Neither the Illinois Central, the New Orleans Great Northern, or the Fernwood & Gulf Railroads connect with the Cybur, Gulf & Northwestern, nor do they control that road in the making of rates from points on its line. The Cybur, Gulf & Northwestern Railroad formerly extended from Picayune, Mississippi, on the New Orleans & Northeastern Railroad, now a part of the Southern Railway System, to a point ten miles in the interior. A complete history

of the road will be found in the complaint of the Cybur Lum-
200 ber Company vs. N. O. & N. E. Railroad et al, I. C. C. Docket 8276, 43 I. C. C. No. 268.

This road, I am informed by the Southern Railway, ceased operations September 30, 1917, and a part of it was taken over by the Pearl River Valley Railroad. Therefore, any reference to the Cybur, Gulf & Northwestern Railroad does not reflect present-day conditions, but merely refers to a paper adjustment.

Q. Does the Illinois Central, New Orleans Great Northern, or the Fernwood & Gulf, or either of them, connect with the Pearl River Valley Railroad, and do they, or either of them, in any wise control the making of the rates on yellow pine lumber from points on that road, meaning the Pearl River Valley Railroad?

A. Neither the Illinois Central Railroad, New Orleans Great Northern, or Fernwood & Gulf connect with the Pearl River Valley Railroad, nor do they control that line in the making of its rates.

The Pearl River Valley extends from Nicholson, Mississippi, on the New Orleans & Northeastern, to Delton, Mississippi, a distance of 14.9 miles.

The policy of the New Orleans & Northeastern Railroad with respect to its short or tap lines has been different from other roads, as previously pointed out. However, since the New Orleans & North-
eastern has been under Government control the administration
201 has reached the conclusion that this road should be treated the same as other short roads in the southern region—that is, by making the maximum shrinkage as provided in the commission's tap-line decision—and if that road feels that it is entitled to greater revenue it should obtain same by adding to the junction-point rate such arbitrary as it considers proper.

Q. Does the Illinois Central, the New Orleans Great Northern, or the Fernwood & Gulf, or either of them, connect with the Mississippi & Western Railroad, and do they, or either of them, in any wise control the making of rates on pine lumber from points on that line?

A. Neither the Illinois Central, New Orleans Great Northern, or the Fernwood & Gulf connect with the Mississippi & Western Railroad, and they have absolutely no control over the making of rates on that line.

The Mississippi & Western, as I have previously pointed out, is controlled by the same interests as control the Fouke Lumber Company. It connects with the Gulf, Mobile & Northern Railroad at Stevens, Mississippi, and extends to Fouke, Mississippi, a distance of 13 miles. There are no mills located on this road except at Fouke, and these mills I am informed are the mills of the Fouke Lumber Company.

202 The trunk-line connection of the Mississippi & Western—that is, the Gulf, Mobile & Northern—shrink its revenue only to the extent as authorized in the so-called Tap Line cases, I. & S. 11, and its connections do not make any shrinkages whatever. Apparently the proportions on this basis are accepted by the originating

road because of the relationship between the interests controlling the railroad and the lumber mill.

Q. Do these same three lines, or any of them, connect with the Alabama & Mississippi Railroad, and do they in any wise control the making of rates on pine lumber from stations on that line?

A. They do not connect with the Alabama & Mississippi and have no control over the making of rates from points on that road.

Q. By "they" you mean the Illinois Central, New Orleans & Great Northern, and the Fernwood & Gulf?

A. Yes, sir. The Alabama & Mississippi Railroad formerly connected only with the Mobile & Ohio Railroad at Vinegar Bend, but subsequently by extensions and by acquiring certain other railroads extensions were made through Leakesville, making a connection with the Gulf, Mobile & Northern at that point, and Pascagoula, where they connect with the Louisville & Nashville Railroad. The adjustment of rates, however, was fixed at the time when the connection
203 was made with the Mobile & Ohio Railroad.

Q. Having covered the allegations of unjust discrimination, what have you to add concerning the allegations with respect to the unreasonableness per se of the rates involved? Have you prepared any exhibits in that connection?

A. I have understood from this complaint that the allegations of relationship and discriminations were the controlling allegations or factors, and that the allegation with respect to the reasonableness per se were merely incidents thereto.

The rates on lumber, pine lumber and in fact all kinds of lumber, from the Mississippi Valley territory have been investigated in so many proceedings, and recently under I. & S. 520, 34 I. C. C. 562, and I. & S. 745, 42 I. C. C., 548; and the reasonableness per se of the rates so well established as a matter of record, that I did not consider it necessary to dwell upon this point extensively.

In the proceedings referred to it has been shown that in its efforts to place its lumber mills on a competitive basis the Illinois Central Railroad has established an extremely low level of rates, many of which are lower than rates in the Central Freight Association
204 territory for similar distances, and it is generally recorgnized that the Central Freight Association territory is about the lowest adjustment in the country.

To illustrate this, our rates on pine lumber from Fernwood, Mississippi, to Cairo, Illinois, for a haul of 450 miles south of the Ohio River, are 19 cents per hundred pounds. The rate on pine lumber from Cairo to Belle Fontaine, Ohio, for a 456 mile haul, is 19½ cents per hundred pounds; and from Louisville, Kentucky, to Steubenville, Ohio, the rate is 19½ cents for a 440 mile haul.

The rates north of the river, as well as south of the river, are used in constructing through rates on which considerable traffic is hauled. Many other similar illustrations could be given, but these, as I have already stated, have been shown in the proceedings to which I have referred.

Contrasted with the adjustment of rates on pine lumber, the first class rate from Fernwood, Mississippi, to Cairo, Illinois, is $1.16½ per hundred pounds, as compared with the first class rate from Cairo to Belle Fontaine, Ohio, of 76½ cents, and from Louisville to Steubenville of 75 cents. There is no connection, of course, between the class rate adjustment and the lumber rate adjustment, but these figures are merely given for the purpose of showing that proportionately the lumber rates from our points are on an extremely low level, and one contrary to the general basis of rates in southern territory, as it is well known that the rates in that territory are, generally speaking, on a higher level than in Central Freight Association territory.

205

I have prepared several statements which will make this record complete, and which in my opinion will demonstrate that the rates attacked are not unreasonable. The comparisons are confined largely to transportation through the same territory, and there can be no question as to the circumstances and conditions incident to the transportation being such as to make the rates used fairly comparable. The comparisons could be extended greatly, but in view of this and the tests already made, I deem them sufficient to prove the reasonableness per se of the rates. I will offer these statements in evidence.

(The documents were thereupon received in evidence, marked "Defendants' Exhibits 11, 12, and 13, Witness Sheppard," respectively, and are forwarded herewith.)

The WITNESS. Exhibit No. 11 is a sketch which shows in comparison the rate from Knoxville on the Fernwood & Gulf Railroad for a haul of 937 miles with the rates from points in Georgia on short railroads for equal distances, showing that the adjustment from the Fernwood & Gulf Railroad stations is much lower than from the Georgia producing territory.

206

Exhibit No. 12 is a similar exhibit and shows Cincinnati as the destination.

Exhibit No. 13 is a statement showing numerous rate comparisons from points in the southern region and in other regions for equal or substantially the same distances, and in making this exhibit I have confined it largely to points of origin in the southern region on railroads similar in character to the Fernwood & Gulf Railroad. However, there are some other railroads, that is, the longer railroads, trunk line adjustments in there, which show that the Fernwood & Gulf has a lower adjustment of rates than is operated by the trunk lines from certain sections.

On each of the statements I have shown, in addition to the actual mileages between the points mentioned, the average mileage and the average rate.

For example, the rate from Knoxo, Mississippi, to Cincinnati is 28½ cents per hundred pounds for a distance of 815 miles. I have compared that rate with other rates to Cincinnati and to other destinations for substantially the same haul; and at the bottom of each page I have averaged the distance and averaged the rate

207 by dividing the mileage and the total rates by the number of points, getting on Cincinnati a result of an average haul of 743 miles with a rate of 31.3 cents.

The other averages are made in the same manner, and there is included in this exhibit sheet 7–A, showing New Orleans, but we have since learned that New Orleans is not included, and this sheet need not be given any consideration.

Q. You have taken the short-line distances, have you, Mr. Sheppard?

A. Yes, sir.

Q. And these railroads, are they the originating roads or the routes?

A. They are the originating roads. I will state, Mr. Humburg, that on sheet 11 the abbreviations are explained so that they can be easily checked.

Q. The points that you have picked are lumber originating points?

A. Yes, sir.

Q. And there is a movement of traffic from that general territory to the destinations here involved?

A. Yes, sir.

Q. The Fernwood & Gulf Railroad is not under Federal control?

208 A. No, sir; the Fernwood & Gulf Railroad is not under Federal control. It has been released; except I believe they have what they call a modified contract which retains them to an extent, but they are not under what you call Federal control.

Mr. HUMBURG. That is all. Have you anything, Mr. Green?

Q. (By Mr. GREEN.) Just a few things that I sort of disagree with my friend about, and concerning which I would like to question him.

As I understand it, the Mississippi Central and New Orleans Great Northern are under Federal control.

A. Absolutely; yes, sir.

Q. Now, Mr. Sheppard, to begin with, what has been consistently the relationship existing between the Fernwood & Gulf Railroad and the Illinois Central Railroad, as to unity of operation and control of the Fernwood & Gulf by the Illinois Central?

A. There is absolutely no unity. The Fernwood and Gulf Railroad is an entirely independent railroad. We have absolutely no control over them as to any of their policies or operations.

Q. Please state whether or not of the roads that connect with yours they did not need Christianizing more, possibly, than any other road you had.

A. In what respect?

209 Exam. SMITH. That is a technical term we do not understand. Kindly define that.

Q. (By Mr. GREEN.) In other words, what I mean is that you had more disagreements and differences with the Fernwood & Gulf than possibly any other short line among your connections.

A. We have disagreements with all of them, but there have been no disagreements about the basis of the lumber rates to apply from the Fernwood & Gulf Railway. In other words, the Fernwood & Gulf Railway have established originally their rates two cents per hundred pounds over the trunk-line rates, and they have constantly maintained that basis.

Q. To begin with, the history of the Fernwood & Gulf rates, beginning about the year 1906, will you please tell the commission, if your information goes back that far, as to how lumber was moved from the mills on the Fernwood & Gulf to your railroad, and at what rate?

A. The rates from all of those short roads, including the Fernwood & Gulf, were handled on the basis of local rates of the originating road up to the junction, and the local rates beyond. In other words, combination on the junction point.

Q. Please state whether or not at that time there was or was not any through rate in effect.

210 A. There was not prior to the date I mentioned, in May, 1906.

Q. Will you please tell the commission what the local rate of the Fernwood & Gulf to the junction point was, if your recollection will permit?

A. I haven't any information on that. I tried to find out what their locals were, but I could not find their tariffs. We do not keep a complete record of their tariffs.

Mr. GREEN. Mr. Examiner, I reckon I might testify just a little.

Exam. SMITH. Your statement will be accepted at this time, Mr. Green.

Mr. GREEN. My information is that it was five cents. Is that correct?

The WITNESS. I would say that five cents would not be out of line with those short roads in that territory.

Exam. SMITH. Five cents would fit in with a two-cent arbitrary now just about.

Q. (By Mr. GREEN.) Now, going up to the road just immediately north of that, the history of that connection with your road, namely, the Natchez, Columbia & Mobile, was developed in the old Two Cent Rate case, the Central Yellow Pine case, and it was shown in that record, was it not, that that rate was 4 cents local in, and

211 that there was no recognition by your road of this little railroad as a carrier?

A. Yes. There was one shipper in that proceeding who had a mill located on the N. C. & M. who complained very bitterly about the combination basis applying from the N. C. & M. points, and about the Illinois Central Railroad refusing to make allowances and all that, but the commission did not condemn the combination basis. In fact, they merely instructed that the two cents advance that had been made by the Illinois Central in its rates be taken off, and therefore, notwithstanding this shipper's complaint about the adjustment on the

N. C. & M., it allowed the combination basis to continue from that road, and that was not changed until some time in 1906, when we accorded this general basis to all of our tap-line or short-line connections, and the N. C. & M. made their rates two cents over the junction rate, the same as the Fernwood & Gulf.

Q. Now, with reference to the impossibility of competing with a two-cent differential, please state to the commission whether or not it is not a fact that in a former case there was a difference in the rate on lumber hauled in a flat car over the rate on lumber hauled in a box car of sometimes as high as 7 cents, and it was subsequently reduced to 3 cents.

212 A. My recollection of that, Mr. Green, is just the opposite; that is, that the flat-car rate was lower than the box-car rate.

Q. All right.

A. That is my recollection. I don't know exactly what the differences were, but there was not a wide difference between the box and the flat cars.

Q. Now, will you please explain also what was further developed in the original hearing with reference to the Mobile & Ohio, as to why its policy with reference to its lumber development was possibly not the same as with reference to your road?

A. Mr. Taylor, I believe it was, who testified for the Mobile & Ohio, stated that his road was a very old road, having been constructed before the Civil War, and that the timber along its line had been largely cut out, and for that reason it was compelled to carry a lower rate adjustment on the Mobile & Ohio, or at least it did carry from these Mobile & Ohio stations lower rates than other roads in that territory.

For example, their rate was much lower than the rate on the Illinois Central. There was a constant fight between the carriers in those days for the traffic. The Illinois Central Railroad was trying to get its line on a basis as low as the lines east, like the

213 Mobile & Ohio and the lines west in upper Arkansas and Missouri, and the thing finally developed by our making our rates the same as from the Missouri territory, which these other roads down in that territory met, and that put the roads for a time on the same basis as to the trunk lines.

The Mobile & Ohio felt, as explained by Mr. Taylor——

Q. Wasn't that Mr. Russell?

A. I was under the impression that it was Mr. Taylor. Maybe it was Mr. Russell. Anyhow it was an official of the Mobile & Ohio, and they explained that as their reason for making the lower rates on their road, and no doubt they have been controlled by that feature in making rates from points on their short-line connections. However, I cannot say as to that. We were not informed as to the Mobile & Ohio's change in policy until this investigation came along.

Q. Will you please tell the commission, if you can do so, how the value of lumber at the time of these differentials about which I have

been speaking compared with the value of lumber at the present time?

A. I have no figures as to actual values; but from general knowledge I would say that the rates on pine lumber from 1906 to the present day have increased by four or five times.

214 Exam. SMITH. What do you mean, four or five successive increases?

The WITNESS. No; I mean that the price of lumber to-day is about four or five times what it was in 1906.

Exam. SMITH. The price of the lumber itself?

The WITNESS. Yes.

Exam. SMITH. Not the rates on lumber.

The WITNESS. No, sir.

Q. (By Mr. GREEN.) That is just the point to which I was directing your attention, if you please; the price of lumber has advanced materially and the rates on lumber have not advanced, have they, in proportion to the price?

A. No, sir; we have made practically no increases in the rates on lumber from this producing territory since they were fixed by the commission in the Yellow Pine cases, except that to north bank Ohio River crossings, along about 1915, in order to satisfy a ruling in a complaint made by the Ohio River cities, we made a difference between the north and south bank Ohio River crossing rates of one cent per hundred pounds to cover the bridge arbitrary. That caused an increase of one cent per hundred pounds to the north bank Ohio River crossings. That has been the only increase made in the rates since they were fixed in the Yellow Pine case, except

215 the general increase fixed by General Order 28, which was a 25 per cent advance, with a minimum of 5 cents.

Q. (By Mr. GREEN.) Let us take, for example, a territory beginning at Vicksburg, on the Mississippi River, projected east to Jackson and south along the Pearl River to the Gulf; then projected to the mouth of the Mississippi and thence up the Mississippi to the point of beginning. I will ask you with reference to the territory thus defined, what is your information as to how much of the timber has been removed up to the present time from that territory, and how long there will be a lumber tonnage moving out of that district?

A. I have no actual figures to show what the standing timber is in the territory you have described, but I do know this, that as to the Illinois Central and Yazoo & Mississippi Valley points, the tonnage along our road, or the standing timber, has been largely cut out, and that the larger operations in that territory now are confined to the mills who have these short or tap line connections such as the mill at Norfield, the mill at Natalbany, the mill at Kentwood and Fernwood, and points like that. They obtain their supplies of standing timber, not from points on the Illinois Central Railroad, but from those short line connections.

Q. I will ask you whether or not an estimate of a period
216 of five years for the substantial exhaustion of yellow pine timber in that territory appears unreasonable from the information which you have?

A. We made some investigations several years ago as to these mills—I think it was about five years ago—and the longest life of any of those mills along our road was about eight to ten years, so they have got now about anywhere from three to five years life, according to the investigations made at that time.

Q. Now, will you tell the commission whether or not, up to this time, there has not been a uniform practice, so far as our railroad is concerned—that is, the Fernwood & Gulf Railroad—of plussing from all of its local stations, except where compelled by competition to do otherwise, the rate named at the junction point?

A. The Fernwood & Gulf have consistently followed the practice of making their local station rates differentials over the trunk line junction. The only exception that I know of that they make to that, and that is not at their local station but is at their junction point, is where, for example, they have undertaken to meet at Tylertown via Fernwood and the Illinois Central the rate of the N. O. G. N., and they have undertaken to meet at Fernwood the rate of the Illinois Central Railroad operating out through Tylertown
217 and the N. O. G. N. That situation was considered by the Interstate Commerce Commission in connection with fourth section order No. 2754, and the commission granted the Fernwood & Gulf along with a number of other short line carriers, and their trunk line connections, fourth section relief to met the situations of that kind.

Q. I will ask you whether or not that practice has not been consistent also with the N. C. & M., the Liberty White, the K. G. & S. W., the K. & E., the L. L. & N. E., the N. O. N. & N., and the Garyville Northern, shown in your Exhibit No. 5?

A. That is true. All those roads have consistently plussed the junction-point rate and have taken up the plussage.

Q. For their own benefit?

A. For their own benefit; yes, sir.

Q. Now, will you please tell the commission how long this practice has been in existence and what percentage of the timber has moved out from this territory under this practice which you have detailed?

A. As to when the practice began, that commenced, as I pointed out in my testimony, along about 1906, the same time that we established the rates for the Fernwood & Gulf.

218 However, this does not mean that the rates on the differential basis moved all of the traffic from these short roads, because prior to that time the roads located on the short roads paid the combination rate. In other words, they paid more than the differential.

The Liberty White Railroad, which was built by the J. J. White interests, has cut out considerable of its tonnage, and all of the independents located along its railroad and the J. J. White people have discontinued operation at McComb and have taken up the railroad east of McComb.

Q. Wait a minute; you are going too fast for us there. When you say that the J. J. White people have taken up their road, are you not misstating the facts in this, that their creditors took it up for them?

A. Yes; they were in the hands of a receiver, and I understand they had considerable trouble about it; but, anyhow, the track has been taken up and there is no lumber tonnage out there. The entire tonnage from that section has been moved either on combination or a differential basis.

On the Kentwood, Greensburg & Southwestern and the New Orleans, Natalbany & Natchez Railroad that tonnage has been practically cut out and moved out on a combination or on a differential basis.

219 The N. C. & M. road, to a large extent, has been cut out. However, they are still getting some tonnage from this line.

The Liberty White Railroad extends west of our road and has some lumber tonnage, but the bulk of the standing timber along that road has been cut out and moved either on the differential or combination basis.

On the Kentwood & Eastern Railroad, on a certain part of it, all of the tonnage has moved on either a differential or combination basis, and part of that track has been removed; and as I pointed out in my testimony they have used the old rail that they took up in making a longer connection, and absorbed another railroad. Just what their prospects are I do not know.

The L. N. & N. E. Railroad is a road that has been built in recent years and I do not know how much tonnage they have left.

The same is true of the Garyville Northern Railroad. They have only been in operation the last five or six years, and I understand they have tonnage on their road, and that they have considerable yellow pine that has not been moved. The first yellow-pine mill was located on their road a short time ago.

Q. Taking the whole situation, would you say it was at all unreasonable to say that there had been moved under the practice
220 here attacked, from these lines, say, 75 per cent or more of the standing timber?

A. I don't think that would be a high estimate, or too high an estimate. In fact, I think the first mistake made by the roads down there was taking anything less than their local rates up to the junction. I think that is where they made their mistake.

Q. With regard to one of your exhibits, I noticed shipments to Nashville. Those are still moving on a combination of locals, are they not? There is no through rate, as I understand it.

A. No through rate to Nashville; no, sir.

Q. No through rate to Union City?
A. No through rate to Union City.
Q. Nor Chattanooga?
A. No, sir.
Q. With reference to the financial condition of some of these roads down there, what do you know about the Liberty White?
A. The Liberty White has been in financial straits for quite a few years, and its interests are still in the hands of a receiver. Just exactly what their financial standing is at this time I don't know, but I have been informed that they would be very glad to take up the balance of the road and retire from handling traffic altogether,
221 but for some reason they are compelled to maintain that particular section west of our railroad, although it is not a paying proposition.
Q. With reference to the Kentwood & Eastern, do you know anything about their troubles in taking up their road?
A. The Kentwood & Eastern Railroad took up a part of their narrow-gauge line extending over to Hackley, Louisiana, because they were not making any money in the operation of the line; there was no further traffic out there to be handled to amount to anything; and I have been informed they thought they were within their rights to move or remove this section of the road. However, the Louisiana Railroad Commission took a different view of it, and I understand the matter now is before the Supreme Court for decision as to whether the Kentwood & Eastern Railroad will be compelled to operate this railroad on which there is no traffic to pay for the operation.
Q. You have got, then, a line that is immediately south of the Fernwood & Gulf and a line that is north of the Fernwood & Gulf with the timber gone. Now, will you please tell the commission as a traffic man what is going to happen to the Fernwood & Gulf after its timber is gone?
A. I don't see any reason why the experience of the Fern-
222 wood & Gulf should be any different from the balance of these roads. I think within five years' time, or thereabouts, and certainly within ten years' time, the Fernwood & Gulf Railroad will have got out all of the timber and moved all of the timber along its railroad, and it will have to depend exclusively on such other traffic as will originate in that territory. The experience has been this, that there is not sufficient traffic in the territory after the timber is cut off to support a railroad. That has been thoroughly demonstrated in the case of the Liberty White and the Kentwood & Eastern.
Q. How about the Finkbine Lumber Company road that was connected with the Gulf & Ship Island road?
A. I am not familiar with that one, Mr. Green, but I will say that the experience of all of them is that when the timber is gone the road is gone.

Q. I will ask you, please, sir, to assume this situation: A road of the kind and character of the Fernwood & Gulf, serving a territory wherein there is predominantly only one class of tonnage to be moved, which is being constantly exhausted by being cut and converted into lumber; will you please state whether or not from a traffic point of view there should not be integrated into that rate some form of charge for taking care of a capital return at the end of the operation?

223 A. I would say so; yes, sir; not only to make a capital return but to pay satisfactory interest on the investment during the period of operation.

Q. In your experience as a traffic man have you come into contact with a situation of that kind?

A. No; I have not.

Q. So far as you know, that is a novel kind of a proposition, is it, from a railroad standpoint?

A. A traffic man with a railroad like the Illinois Central would hardly consider that in making the rate adjustments on our own railroad. However, it would seem to me quite vital that a traffic official of a short road should give consideration to a feature of that kind.

Q. You are a rate expert man, are you not?

A. Well, I know something about them.

Q. You are understood to be. Now, from your experience and knowledge, Mr. Sheppard, tell me how that situation ought to be handled, assuming my factors to be correct.

A. Well, it is pretty difficult in adjusting a freight rate to put just that kind of a feature into consideration, as to just what measure or amount you should include in the freight rate for that purpose. The only way I could see that I could get at a satisfactory decision for myself would be to compare my earnings on the traffic with the earnings of other similar roads.

224 That is to say, if other similar roads were applying a combination or differential basis, and my combination or differential basis was in line with theirs, I believe I could then fairly say that the figures represented by all of these short roads would include something of that character; but just how to include it specifically I would not like to say, because I have had no experience along that line.

Q. I will ask you from an accounting point of view whether the proper method of reaching that would not be to ascertain as nearly accurately as possible the total amount of tonnage, lumber tonnage in our case, that was to be removed, and then to create a reserve out of the freight rate equal to a capital return that would, when the entire amount of timber was cut, equal the amount of the investment in the railroad plus its junk value?

A. Oh, yes; I understand this question now much better than I did before. In making any rate adjustment the volume of tonnage

is usually taken into consideration, and what that traffic will pay, in making any kind of a rate adjustment. With a fixed volume of movement for a branch line connecting with our railroad, or a connecting line or independent railroad, that would be the first thing that would be taken into consideration, the volume of
225 tonnage to be moved from that particular railroad, and the expense they would be put to in the building of the railroad, and whether the freight rates that could be obtained for the traffic would pay for the investment and a satisfactory return. That is always considered in making an extension of that kind. That would be a proper way in making settlements for accounts, after you had made your freight rates, for the accounting department to set aside a certain fixed amount for the net return.

Q. On your Illinois Central Railroad theoretically you are going to run forever. On our Fernwood & Gulf Railroad we have a self-limited proposition. Now, will you please explain to the commission from your point of view whether or not the two rate structures therefore should be similar upon railroads thus circumstanced?

A. No, sir; they should not. In other words, the short railroad which has only got a very short life, you might say; in fact, a life confined to its lumber tonnage, should not be treated like a standard line that has in addition to the local tonnage along its railroad through tonnage of considerable volume and which will support it after the local tonnage has been largely removed.

Q. Will you tell the commission how much through tonnage the Fernwood & Gulf would ever get?

226 A. The Fernwood & Gulf, in my opinion, will never get any. In other words, they connect with the Illinois Central on one side——

Q. You won't give us any, will you?

A. I would say no, we won't give you any tonnage to speak of, because we serve the northern and the southern territory. The New Orleans Great Northern Railroad I don't think would want to handle any tonnage with you, and they don't handle any through tonnage with you to-day, because they have their own routes to the northern and southern territories.

Q. In other words, we are between two through lines that can serve the same territory?

A. That is correct, and they do serve the same territory.

Q. The Mississippi Central has a territory and a tonnage that is a through tonnage, has it not?

A. Yes; the Mississippi Central Railroad is, in my opinion, an entirely different kind of railroad from the Fernwood & Gulf Railroad. In the first place, it has 160 miles of track and serves an important point, such as Hattiesburg, having a population, I would say, of about 12,000 or 15,000. That is only my estimate; it may be larger than that; then they have about 6,000 or 7,000 at Brookhaven,

and then when you get over there to Natchez they have got
227 about 15,000 there, and in addition to the merchandise traffic it handles to these large towns it has quite a well built-up territory along its railroad and forms a through route from the east to the west, handling stuff in connection with the New Orleans & Northeastern and Missouri Pacific through traffic.

If I am wrong about that Hattiesburg population, correct me; that is just an estimate on my part.

Q. I think they claim 25,000.

A. I have not been there since the camp was located there. Maybe they have grown since.

Q. Mr. Sheppard, how many short line railroads are there, roughly speaking, in the United States?

A. Oh, the Lord knows. I don't know. I haven't the slightest idea.

Q. There is enough of them to form an association and to get into Congress, isn't there?

A. Yes; they have been quite active in Washington recently in connection with different matters, but particularly in connection with handling traffic from connections. From my impression of the southern region there, it shows something like a hundred of them.

Q. There are over eight hundred of them altogether, are there not?

A. I don't know.

Q. Assuming there are over eight hundred, will you please
228 tell the commission how the principle established in this case with reference to the short line railroads, would affect the general earnings of this class of carriers?

A. If the commission should rule that in all instances the junction point basis should apply, and the tap line or short line should not be allowed any differential over the trunk line rates, in order to obtain a reasonable and proper compensation, I would say this, that the tap lines would all be forced into bankruptcy, because the measure of revenue which they would require would be so great as to make it impossible for the longer railroads to allow them satisfactory proportions, even though they were inclined to make such allowances.

Q. I will ask you whether or not your railroad is in position to make any additional allowances and absorb these arbitraries?

A. No, sir, we feel like we have gone the limit when we allowed them what the commission allowed them in the Tap Line cases, and we certainly are not prepared to allow them anything in addition to that.

Q. Your earnings are not such as to justify any additional allowances?

A. That is correct.

Q. If you were called on to make additional allowances,
229 state what would be the effect as to an advance or not in rates.

A. What do you mean by an advance or not—in rates?

Q. Whether you would not have to advance the whole lumber rates if you had to make additional allowances to the short lines.

A. That would be absolutely necessary, because we could not afford to allow them any additional earnings out of the present rates, and I don't believe the commission would revise the rule in any such manner, after declining to allow an advance east of the river, and pointing out as a distinguishing factor that the rates west of the river included the allowances and the rates east did not.

Q. No; but the effect of the doing away of the plussing of this junction-point rate would be to throw the burden on your road, would it not?

A. On who?

Q. On the trunk line.

A. No; it would throw the burden on the short line.

Q. Assuming, as I shall show directly, that they can not bear it and that it would have to be you?

A. Well, I don't believe it.

Exam. SMITH. I thought the testimony was leading up to
230 the Illinois Central having to bear it, and it would push it onto the poor public.

Mr. GREEN. No; your Honor, we will show that Mr. Sheppard has got to bear this burden before we get through.

Mr. SHEPPARD. As I pointed out, Mr. Green, we could not bear it. The commission has fixed the maximum shrinkages itself in the tap line cases, and we could not treat one short road with which we connect any different from another. In other words, we are shrinking the maximum now that we feel we can do; and as to the roads that are still under the tap-line decision, as some of these are, we could not even increase those if we wanted to, and besides that the commission had in mind what it thought was reasonable shrinkages of the trunk-line rates, and regardless of whether a road is under the tap-line decision, or an independent road, if that was a reasonable shrinkage in the trunk-line rate it is reasonable, regardless of how the road may be operated.

Q. (By Mr. GREEN.) As I understand it, this proposition extends not only to lumber but to all other commodities on these roads?

A. Yes, sir.

Q. So that if the present contention is sustained, there will be a cut off of all of the arbitraries on all of your other commodities?

A. It seems to me that would naturally result. We could
231 not treat lumber any different from other commodities.

Q. Have you any conception as to the amount of reduction that would thus be brought about?

A. No; but it would be an immense sum. It would be difficult to conceive the amount that it would go to.

Q. With that kind of a situation, what have you to say as to the ability of the carriers to stand it at the present time?

A. You mean the ability of the trunk-line or the short-line carriers?

Q. Yes, sir.

A. The trunk-line carriers are in such straits that they can not allow any additional proportions or revenues out of the trunk-line rates, and the result would necessarily be that the shrinkages would have to be borne by the short roads. It looks to me like this would not only prevent further development of these short railroads, but these that are already operating would be forced out of operation. In other words, they could not make enough to meet their expenses.

Q. The establishment of a principle of that kind, then, in your judgment, would simply thwart the future development of these short-line railroads?

A. I would say so; and I would say it would be extremely
232 unfair to the short roads to say to them that they must operate the main-line basis of rates when they have nothing to do with the main-line basis; that is, the fixing of it. They do not control the main-line basis of rates, and their only interest is in transporting the traffic from their own railroad up to the junction of their trunk-line connections.

Q. Will you please point out to the commission the amount of extra labor or service that there is entailed upon a short line by reason of that function, such as switching and so forth? You know that better than I do.

A. The short railroad as a rule has this to perform: It first has to move these cars from the interchange out to the loading point and then bring them back. In other words, it has a double haul. Having no through tonnage where they can drop the cars off and take cars in loaded and bring them out empty, and drop them off at the loading point, it has to perform a double haul.

Q. In other words, on this movement at Knoxo, it is not for 27 miles from Knoxo to Fernwood, but 27 miles from Fernwood out to Knoxo and then 27 miles back?

A. That is correct; yes, sir. Then the short-line railroads have to maintain the same car records and per diem records that a standard railroad has to maintain. It has to purchase its fuel and other supplies and pay the freight rate up to its junction point. It also
233 has to purchase its supplies in much smaller quantities than the trunk-line railroad, usually going in and paying a very high price for it, much higher than the larger road can contract for its supplies for its own railroad; and in addition to that it has to maintain an organization for the upkeep of 27 miles of railroad, or 32 miles, or however long the short line may be, similar to the organization of the large line, which does not have to divide its road up into 27-mile sections but has one man maybe to handle several hundred miles, making the tap line or short line's expenses much greater than for the longer line of railroad per mile of road.

Q. Will you please tell the commission whether or not a road of the kind and character of the Fernwood & Gulf, by reason of that fact, can be as efficiently and economically operated as a longer road?

A. In my opinion it could not. I have never had any connection with a short road, but my idea is that they could not be.

Q. As I understood your testimony here, you have picked out some 95 short lines in this southeastern territory that have been made the basis of your exhibits. Among those I notice there are the Jackson & Eastern, and the Meridian & Memphis, both located in the State of Mississippi, and which move on junction point rates. I will
234 ask you whether or not those two short lines are in any way connected with any industrial operation, and whether or not their construction was not for the purpose of obtaining connections by the citizens of Meridian, so as to advance the wellfare of that town.

A. In the first place, Mr. Green, I want to correct you, right at the start of your question, by saying that these roads in the Southeast were not picked out. We tried our best to get every road that is in the southern region in this statement. They are not picked. We tried to get every one of the short roads.

As to these particular roads you speak about, the Meridian & Memphis Railroad was built from Meridian, and its first connections were on lines serving Meridian, and I understand the Meridian people were the people that were backing the roads. However, I haven't any definite information on that point. The road subsequently was extended to Union, Mississippi.

The Jackson & Eastern Railroad was built from Union, Mississippi, which is the junction of the Gulf, Mobile & Northern, either west or southwest, I have forgotten which, and these two roads, the Meridian & Memphis and the Jackson & Eastern, were operated together for a while handling their traffic through Meridian. But the Meridian & Memphis end of it extending from Union to
235 Meridian, I believe, has been taken over now by the Gulf, Mobile & Northern. However, I don't think they have taken over the Jackson & Eastern. Just why that is or how it is, I don't know.

Q. Did I understand you correctly when you made the proposition that there was no blanket, in the true sense of the word, embracing the territory of origin in this case?

A. There was no blanket in the sense that I understand the term blanket, and that is, covering all the railroads in that territory. Therefore, as I pointed out, the Illinois Central Railroad fixed its adjustment as to what it thought it ought to be in order to meet certain competition, and some of the other railroads to the Central Freight Association territory and Ohio River crossings made their rate the same, but each road was controlled by itself individually as to what rates it would make, and there was no general investigation or general readjustment of rates such as was made west of the Mississippi River, whereby all of the rates of all of the roads in that territory, long and short, were put on a blanket or zone basis.

In other words, my understanding of the term "blanket basis" is a zone basis embracing all points in a certain described area,

236 regardless of the character of road on which they are located, and there is no such adjustment in the Mississippi Valley territory or in the southeastern territory, and where reference was made to the blanket adjustment in these territories they have reference to the rates applicable from trunk-line points only.

Q. Now, Mr. Sheppard, really has there ever been any segregation and separation of the territory east of the Mississippi River in the yellow-pine territory into two separate zones? I will ask you whether or not the designation of these two separate zones, or alleged separate zones, did not arise out of two different cases which were conducted before the Interstate Commerce Commission years ago—the Central Yellow Pine Association and the Tift cases?

A. Yes; that is where they developed the different sections of the country—that is, as to producing sections. There was really no separation of the territory as to the southeastern yellow-pine blanket or the Mississippi Valley pellow-pine blanket. It was all an extension of one forest, and the roads in those several territories—that is, the trunk-line railroads—fixed certain adjustments from their own territories, but they never did fix a blanket adjustment, nor did they separate the southeastern rate adjustment from the Mississippi

237 Valley rate adjustment.

The Mobile & Ohio Railroad has always been considered the dividing line between the southeastern territory and the Mississippi Valley territory, but when talking about the Mississippi Valley pine adjustment, they cut further east toward the L. & N. Railroad at Montgomery and Selma.

Q. So these boundaries are imaginary rather than real?

A. Yes; that is true, and as further illustrating that, even over in Georgia, certain parts of Georgia, they maintain to certain Ohio River crossings and to the territory beyond the same rates as from the Mississippi Valley territory, showing that there is no separation of territory from the rate adjustment standpoint.

Q. How far is the New Orleans & Northeastern located from the Illinois Central?

A. At its farthest point, Jackson, Mississippi, and Meridian, it is about 96 miles, and at Hattiesburg, 85 miles, and they gradually get nearer to our road as they get nearer to New Orleans.

Q. In the pine producing sections, how close do the two approximate?

A. In the southern pine producing section, anywhere from 25 to 50 miles, I would say.

Q. How far is the Mobile & Ohio east of that?

238 A. The M. & O. at Meridian is 96 miles east of the Illinois Central Railroad, and as it goes down to Mobile it gets farther from the Illinois Central. It would be over 100 miles, 125 or 130 miles, I would say.

To the territory north of the A. & V. the Mobile & Ohio comes closer to the Illinois Central, and both of them have some production of yellow pine north of the A. & V. Railroad.

Q. As I understand your exhibit, you show all of the interlocking roads between these north and south trunk lines, do you not?

A. Yes; my exhibits show that.

Q. The N. O. G. N. road was constructed and completed in about what year?

A. The construction of the N. O. G. N. began from Slidell, its connection with the New Orleans & Northeastern. I haven't just at this time information as to when the construction of this road began, but it was along about 1900, I would say, and it reached Jackson, Mississippi, its northern terminus, in 1909, the summer of 1909.

Q. The original roads in this territory were, first, the Illinois Central and the Mobile & Ohio, were they not, and the L. & N.?

A. And, I think, the A. & V.; that is an old road, too.

Q. And the A. & V.?

A. Yes.

239 Q. Then at that time there was none of these short roads connecting those four older lines?

A. No, sir; that is correct.

Q. Is it not a fact that in that time, which approximated, say, about 1900, or possibly a little before that, that there was no possibility of the pine that originated on the Illinois Central being moved over and moved north on the N. O. & N. E., and that which was on the N. O. & N. E. being moved over and being moved north on the Mobile & Ohio? In other words, is it not a fact that up to a comparatively recent time the timber that lay along these several railroads was bound to move over those several railroads to its destination?

A. Yes; and it did so move over the railroads. In other words, we did not participate in the handling of New Orleans & Northeastern business, nor did we participate in the handling of Mobile & Ohio business until after it reached Cairo. They turned some of it over to us at Cairo, and possibly some at Rives, a junction just below Cairo; but they did not turn over to us in the pine-producing section any of the tonnage originating on their road, nor did we turn over to them tonnage originating on our road.

The same is likewise true of the A. & V. Railroad. However,

240 the A. & V. Railroad did give us some of their tonnage originating at Meridian and such points as that via Jackson, Mississippi.

Q. Therefore each of these railroads in those years had when these rates were being framed its local tributary timber that was solely utilizable by it?

A. That is right; yes, sir.

Q. How far does the price of a commodity enter into and find expression in the amount of the freight rate to be charged for the transportation of such commodities?

A. That is difficult to say, Mr. Green. It is always customary, or generally customary, in the making of any freight rate to take into

consideration the values or prices of that article; but when you get into the consideration of prices on lumber or clothing or other articles it is pretty difficult to arrive at any proper conclusion as to just how much to include for the increased liability due to the valuation. But that factor is always controlling in the making of any general line of freight rates.

In other words, the greater the value of the commodity the better freight rate it can stand and move.

Q. I will ask you, please, whether or not the price or value of the commodity is not possibly the most important element in the fixation of a rate of freight?

A. No; I would say the value was not the most important. I
241 think competition is largely the most important factor in the fixing of any freight rate. Value is always considered along with other things. Operating difficulties are frequently considered; character of the packages, and so forth, and volume of traffic, too, is another thing that is very important in considering a freight rate—the approximate volume of traffic.

Mr. GREEN. That is all.

Cross-examination.

Q. (By Mr. PALMER.) You were speaking, Mr. Sheppard, about not being able to increase your shrinkage in the junction-point rate in order to extend the rate back to the tap line or short line. Do I understand you to mean by that that you can not do it under the tap-line decision?

A. No; I mean this, Mr. Palmer, that we have got one railroad in here, for example, the Fernwood & Gulf, and the shrinkages of that particular road were originally limited by the tap-line decision. They have since been released, and if we were so inclined we could increase those divisions or shrinkages, but when we undertake to increase the Fernwood & Gulf Railroad that would give them an advantage over a railroad just south of them, for example, like the Natchez, Columbia & Mobile, where the proportion would be limited by the tap-line decisions. The very minute we would do that
242 we would be confronted by the question of discrimination. That was the point I intended to convey.

The second point I wanted to convey was that our returns to-day are such that we could not even consider increasing our shrinkages to any of these roads.

Q. What is the highest division you allow on lumber to any of these east and west lines?

A. The maximum as prescribed by the Interstate Commerce Commission in the Tap Line case. That is, if you mean short lines similar to the Fernwood & Gulf Railroad.

Q. What do you pay the Mississippi Central?

A. At the present time the divisions with the Mississippi Central are of no importance whatever. These rates, in other words, are divided on a basis as fixed by the Railroad Administration. As far

as divisions are concerned, that is not a material matter between the interested roads at this time.

However, as to our allowances prior to Government control, we did not allow them a bit more than we had to and were compelled to by the competition through the New Orleans & Northeastern Railroad; and regardless of what our proportions were that we allowed them, the commission has fixed as maximum shrinkages what they consider reasonable shrinkages in the short-line junction-point
243 rates. Now, if we have to go further than that in connection with another road, because of competition, that is meeting an entirely different situation.

Q. As a matter of fact, your uniform division with the Mississippi Central was 6 cents?

A. Prior to Government control we allowed the Mississippi Central Railroad a proportion of 6 cents per hundred pounds to the northern territory. It was not——

Mr. AUBURTIN. A maximum of 6 cents.

The WITNESS. A maximum of 6 cents, yes, to the northern territory. There was some portion, but not considerable, of the traffic on which they accepted less than 6 cents. However, as I stated, the rates and divisions were fixed before the Mississippi Central got to Jackson, and that is true——

Mr. AUBURTIN. Not Jackson, Brookhaven.

The WITNESS (continuing). And that is true likewise of the G. & S. I.

Yes, it had its connection at Hattiesburg, but it reached Jackson, and the same is true of the Gulf, Mobile & Northern Railroad, which connects with our road at Ackerman, which had its connection, its rate adjustment, and its divisions fixed before it reached Ackerman.

Q. (By Mr. PALMER.) Speaking about the Fernwood & Gulf not being able to get along with any less than it is getting, and
244 particularly with reference to this examination by Mr. Green, and the question of the timber supply and the necessity for setting aside a reserve, that would apply, of course, in case a road was built out there as a purely independent commercial proposition, but suppose it was built out there primarily by a logging or lumber company for the purpose of logging to its own mill. Does it not seem reasonable to you, as a traffic man, if they could induce some other mill to locate on their track and get some paying traffic out of it, that it would be to their advantage to do so?

A. It is to their advantage to locate as many mills as they possibly can on their tracks, and all the tonnage they can get helps them out just that much, and I think they have shown a pretty fair spirit when they made the rate two cents over the junction point, instead of making it the full local rate over the junction point.

Q. It was business on their part to do it, was it not? It was not a purely philanthropic thing for them to invite the Swift Lumber

Company to locate on their line; there was business in it on the theory that they were getting some additional returns?

A. There was business in it and there were other considerations in it, too. I understand the Fernwood & Gulf Railroad did not want the commercial business, they were not particularly after the
245 commercial business, but they had timber scattered throughout this section there and they were extending to get to that timber, and wanted to get the necessary right of way and things of that kind, and it was necessary, in order to do that, to serve those people down there and keep them satisfied.

Q. Of course, it is not my purpose to criticise anybody connected with the transaction at all, but simply to point out that under those conditions it would be a proposition having a little different aspect from that of purely operating a railroad for traffic and for the public.

A. Anything the Fernwood & Gulf Railroad could pick up in addition to their regular tonnage they would be benefitted to that extent.

Q. That is true. That is all I wanted to get at.

A. Well, I say they would be benefitted to that extent, but they would not build a railroad, I don't think, or nobody else would build a railroad out there, just for the Swift Lumber Company's tonnage.

Q. Oh, certainly not.

A. If they could pick up something during the meantime they ought to do it, and whatever they picked up ought to pay a reasonable transportation cost from the originating point down to the junction point, and the people that are benefitted by that transportation ought to pay for it and not the trunk-line connection,
246 which has nothing to do with it. In other words, the Swift Lumber Company ought to pay for it.

Q. You were speaking just now about competition being the most important factor in the making of a rate, which is reminiscent of something in your direct evidence about meeting the tap-line situation established by the Mobile & Ohio and the New Orleans & Northeastern. In other words, if I recall it correctly, you said you learned that those two roads were making an allowance to the short lines connecting with them out of the junction-point rate, and you did that in order to protect the short lines connecting with the Illinois Central against that competition?

A. Yes, the tap lines' mills and the short lines themselves connected with our line.

Q. Now, bearing that in mind, and with the information here of record that this same Mobile & Ohio and New Orleans & Northeastern, and also the Gulf, Mobile & Northern are extending the junction-point basis of rate back to points on various short lines, do you know of any reason why different principles should apply in that case from the principle you applied in the original inception of the tap-line situation?

A. Yes. In the first place, I don't think the Illinois Central or any other railroad should undertake to fix rates from an in-
247 dependent connection. I think that ought to be left to the independent connection. In other words, the independent connection, if it is going to have any independence at all, ought to be left free and independent to fix the rates on its own rails, and that is the very point I wanted you and the commission to get clear, that we have not undertaken to fix the short line's rates or revenues.

We have fixed from the entire producing section, the junction points where we connect with the short line, certain maximum shrinkages. We have subsequently revised those in accordance with the commission's tap-line decision, and everything that is added to the rate, so far as the Illinois Central is concerned, we are not interested in. It goes to the originating railroad, goes to pay it for the transportation of the traffic from the originating point to trunk-line junctions, and is in addition to what the Illinois Central received.

Now, if the Mobile & Ohio Railroad adopts a different policy and wants to extend its rates into the forest because its lumber along its road has been cut out, there is absolutely no reason why the Illinois Central Railroad should be compelled to adopt the same policy, or why the Fernwood & Gulf Railroad should be compelled to adopt the same policy, if those roads are to maintain their independence.

248 Q. Well, it is a very beautiful theory, but it does not take into consideration the rights of the shippers. I believe that is all I care to ask.

Redirect examination.

Q. (By Mr. HUMBURG.) Mr. Sheppard, will you state whether or not it has been your observation that as time goes on the relative value of the lumber coming from the points beyond the junction points on the short lines is increasing compared with the volume that is coming from the points on the trunk lines in the yellow-pine producing district?

A. I do not know as I get your question entirely clear, but as I understand it it is this: The tonnage along the trunk lines is first cut out. That is usually the practice. It is practically all cut out first. Then the lines are extended into the forest, usually by the proprietary mill which is located at the junction point, and it extends into the interior, and as the lumber tonnage along the trunk line goes down the tonnage along the tap line, or the short line, increases, until it is entirely cut off of the tap line, and then there is no further traffic for the tap line, or short line.

Q. So that looking to the future and considering this as a question of the interests of the community and the country, and the
249 development of undeveloped sections of the country, the interests lie in the extension of the short line penetrating the timber where there is timber left?

A. I would say yes.

Q. That is all.

Exam. SMITH. Is that all of this witness?

You are excused, sir.

(Witness excused.)

GEORGE B. AUBURTIN was called as a witness, and, having been duly sworn, testified as follows:

Direct examination:

Q. (By Mr. HUMBURG.) Will you state your connection with the Railroad Administration?

A. I am assistant general freight agent of the New Orleans Great Northern Railroad at New Orleans, Louisiana.

Q. You have been with that road for some time and are familiar with its rate adjustments?

A. Yes, sir; I have been with them for thirteen years.

Q. Have you heard the testimony of Mr. Sheppard in this case?

A. I have.

Q. What have you to say as to adopting it on behalf of that road, or qualifying any part of it?

A. I confirm in every way what Mr. Sheppard has said, and
250 particularly with reference to the propriety of the Fernwood & Gulf making its own rates.

In other words, they are better situated than anyone else to do so, and as an independent railroad they have that power.

The New Orleans Great Northern Railroad, when it was completed to Tylertown, Mississippi, which was in about 1909—the Illinois Central already had its connection with the Fernwood & Gulf at Fernwood, Mississippi, and the rates were all fixed and there was nothing else left for us to do but to adopt them.

That was also true of the line when it was completed to Jackson, Mississippi, on July 1, 1909. We built from Slidell to Jackson. The rates were all fixed in this territory, and being an independent railroad we had to adopt the same rates as were published by lines surrounding us, principally the Illinois Central on the west and the New Orleans & Northeastern on the east, and the Alabama & Vicksburg on the north, and the Louisville & Nashville at New Orleans.

Q. The map made a part of Sheppard's Exhibit No. 6 correctly shows the location, course, and direction of the New Orleans Great Northern Railroad with respect to the Fernwood & Gulf?

A. That is correct; yes, sir.

Q. You have a sort of branch line, I understand, tapping
251 the Fernwood & Gulf at Tylertown?

A. Yes; we have a 41-mile branch from Rio, Louisiana, to Tylertown, Mississippi, connecting with the Fernwood & Gulf at Tylertown.

Q. (By Mr. GREEN.) When was that completed, Mr. Auburtin?

A. I rather believe it was the fore part of 1909 or the latter part of 1908.

Q. Getting down to the financial conditions of the short-line railroads, comparatively speaking, in our section, have you compiled any figures as to your earnings?

A. I have here an income exhibit, one copy, which I don't think it will be necessary to file, as I can give the figures.

Q. That is, just give a generalization?

A. Yes; I am just going to give it in a nice easy way.

Exam. SMITH. Is there any substantial difference between the figures you are about to read into the record and those that you furnished the commission in your annual statement?

The WITNESS. These, Mr. Examiner, are not a full year.

Exam. SMITH. But there is nothing inconsistent between what you have reported in the past and these figures?

The WITNESS. No, sir; these figures I am going to mention were taken from the records of the Interstate Commerce Commission in Washington, on November 22, 1919.

252 Exam. SMITH. They were taken from the figures you returned to the commission?

The WITNESS. Yes, sir. The New Orleans Great Northern Railroad in the first nine months of 1918 earned 107.7 per cent of its compensation. By compensation I mean what the United States Railroad Administration, or the United States Government, allowed us for the use of our railroad during the war time.

For the same period of 1919 we have only earned 12.5 per cent, showing a deficit of 87.5 per cent for that railroad.

That should clearly show that the New Orleans Great Northern Railroad is not in any position to allow the Fernwood & Gulf, or the Natchez, Columbia & Mobile Railroad, any greater allowances out of the junction point rate, if the commission should decide that was a proper basis of rates from those stations; and if they did require a greater proportion, or rather demand that, or if the commission even went into the feature of divisions and stated that the trunk lines would have to allow them, we would have to withdraw from the business.

Cross-examination:

Q. (By Mr. PALMER.) How do you explain that drop?

A. The terrific increase in wages and the decrease in traffic.

253 Q. Which was the greatest factor, increase in wages or the decrease in traffic?

A. I couldn't answer that correctly. I don't know.

Q. Couldn't you say in a general way?

A. There has been a great decrease in our traffic from the period of war—that is, from the time the armistice was signed up to date—and there have been several increases in the wages, including the back pay, unfortunately.

Q. Wouldn't you say they were probably about equal factors?

A. I wouldn't say, because I couldn't answer that question correctly.

Exam. SMITH. Is that all?

Mr. PALMER. I have nothing further.

(Witness excused.)

Exam. SMITH. We will adjourn until 9.30 o'clock to-morrow morning.

(Whereupon, at 6 o'clock p. m. on December 18, 1919, an adjournment was taken until 9.30 o'clock a. m. on December 19, 1919.)

255 CHICAGO, ILLINOIS, *December 19, 1919—9.30 a. m.*

Commission met pursuant to adjournment.

Present as before.

Exam. SMITH. Gentlemen, we will resume.

Mr. GREEN. Your honor, it is a little out of order, but Mr. Kimball has kindly agreed to make a little statement so as to save putting Mr. McElroy on the stand.

Exam. SMITH. Very well. You may proceed, Mr. Kimball.

J. B. KIMBALL was recalled for further examination, and, having been previously sworn, testified as follows:

Direct examination:

Q. (By Mr. GREEN.) Mr. Kimball, I hand you some names. Will you please explain what they are?

A. This list contains several names of individuals who live at stations on the Fernwood & Gulf Railroad, and who are in business and have shipped lumber, and it is assumed will ship some lumber over the F. & G. in the near future.

The first name is R. T. Simmons, at Kokomo. Mr. Simmons owns a gin sawmill and a general store. He does not operate his sawmill continuously.

At Knoxo the Swift Lumber Company is in the lumber manufacturing business only, and operates continuously.

256 William Bilbo has recently built a mill and is hauling his lumber and shipping it from Knoxo.

At Tylertown Q. D. Sauls has a small saw mill. I know he sells considerable lumber to the local trade there and does ship lumber.

At Mesa the Lexie Lumber Company is hauling lumber to this station and shipping from there.

S. A. Simmons, at Mesa, has a saw mill, a gin, and a store. Also a large farm. He runs his mill occasionally, but not regularly.

At Kioto H. M. Lee has a saw mill and has shipped lumber. I would say in connection with that this mill has not run recently.

At Conerly G. W. Vaught; this man has built a saw mill within the last few months, and he runs continuously, regularly.

At Barto J. M. O'Quinn is preparing to ship lumber. This mill is being rebuilt and will probably be in operation shortly. This mill has, as this memorandum says, in the past shipped considerable quantities. I presume that is right.

That is all that is on the list.

Q. Thank you, sir.

Cross-examination:

Q. (By Mr. PALMER.) What is the size of those operations,
257 Mr. Kimball?

A. They are small. With the exception of Mr. Vaught and Mr. Q. D. Sauls, I would say that their operations were merely supplementary or more properly a part of their business only, not their entire business. They are generally referred to as small mills.

Q. Not what you would call an ordinary commercial lumbering proposition?

A. No; not in the general use of the term.

Exam. SMITH. Is that all of Mr. Kimball?

Mr. GREEN. Yes.

(Witness excused.)

J. M. FUSH was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

Q. (By Mr. GREEN.) Give your name, residence, and occupation, please.

A. J. M. Fush; residence, Fernwood, Mississippi; general auditor Fernwood & Gulf Railroad.

Q. How long have you been in the auditing business?

A. Close to sixteen years.

Q. What experience have you had?

A. Well, I have practically been in accounting work for sixteen or seventeen years, which covers all the time doing work, and for the last seven years I have been holding executive positions as auditor.

258 Q. Were you qualified?

A. Qualified.

Q. How long have you been connected with the Fernwood & Gulf?

A. Since August 1, 1918.

Q. I will ask you to tell the commission, please, and introduce as Exhibit 1 to your testimony, the order with reference to the termination of the Tap Line case, so far as the Fernwood & Gulf Railroad is concerned.

A. The Tap Line case was decided by the commission in Docket No. 11.

Q. Investigation and suspension?

A. Investigation & Suspension Docket No. 11, decided in Washington, D. C., on the 21st day of December, 1914.

Q. And your railroad has been on its independent basis since that date?

A. Yes, sir; showing the officers and everybody are separate from any other company.

Q. Where does your railroad run?

A. It extends from Fernwood to Kokomo, a distance of approximately 32 miles.

Q. You are not under Federal control now?

A. No.

Q. Under qualified Federal control, cooperative contract?

259 A. Cooperative contract, but that just regulates the transportation business more than any earning. We stand on our own hook on our earnings.

Q. What kind of tonnage is handled by your road?

A. Principally forest products. I will put in Exhibit No. 1, showing the amount of tonnage shipped for the last three years, as taken from the report to the Interstate Commerce Commission.

Exam. SMITH. That will be marked "Exhibit 14."

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 14, Witness Fush," and is forwarded herewith.)

The WITNESS. This exhibit will show that the lumber and other products of the forest were approximately 93 per cent for the last three years.

Q. (By Mr. GREEN.) This is to represent, if I understand it correctly, the per cent of each class and kind of tonnage handled by that railroad during the period in question?

A. Yes, sir.

Q. Please state whether this is correctly made?

A. It is taken from the records as reported to the commission in the annual reports.

Q. Then this is a recapitulation?

A. That is it; yes, sir.

260 Q. Of the figures handed in to the commission?

A. It is a copy; yes, sir.

Q. Now, if you will, please, state whether you have obtained any information, and if so, what, as to the probable length of the manufacture of forest products along the line of this railway?

A. Yes, sir.

Q. Please state the result of that.

A. I have here an exhibit from one of our shippers that practically owns 85 per cent of the future tonnage that the railroad may derive. This letter will show that in practically ten years the timber will all be cut.

Q. You are familiar with that situation down there, living at Fernwood?

A. Yes, sir.

Q. From your knowledge is that correct?

A. I consider it very correct.

Mr. GREEN. I will offer that in evidence as Exhibit No. 15.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 15, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) Mr. Fush, have the properties of this company been subject to inspection and investigation by the valua-

261 tion section of the Interstate Commerce Commission?

A. Yes, we had the report made as of June 30, 1916, both the engineering and the accounting.

Q. Have you the engineering report with you?

A. I have the engineering report.

Mr. GREEN. Mr. Examiner, do you want an actual introduction of that, or just make reference to it?

Exam. SMITH. Just introduce the summary that you want. There is something that we can check with, without putting the whole report in.

Mr. GREEN. The docket number of that, Mr. Fush, is what?

The WITNESS. It is docket No. 14.

Exam. SMITH. Valuation docket?

The WITNESS. Yes.

Exam. SMITH. Let me see it. Engineering Report upon Fernwood & Gulf Railroad Company.

Q. (By Mr. GREEN.) Please look at that report, Mr. Fush, and tell us the values fixed by the commission, from their summarized figures.

A. They show here on page 4 of the summary sheet of the Interstate Commerce Commission, Division of Valuation, D. V. Form No. 563, showing the inventory as of June 30, 1906, approved by W. D. Pence, engineer in charge. This report will show that the road has
262 gone down to such an extent——

Q. Give us first the value of the things they show, please, sir.

A. They show the cost to reproduce the road, $661,141. The value less proper depreciation is $522,752.

Q. Giving a net value as of that date of what amount?

A. $522,752.

Q. That is charging off for depreciation?

A. Yes. That would be in round number $141,000 depreciation.

Q. Turning to your depreciation of $141,000, I will ask you whether or not there is any depreciation at all set up on your books as a reserve to cover that?

A. None except the equipment, which is compulsory.

Q. Why didn't you set up a reserve?

A. We didn't have the money, or rather our expenses were so great that we had a large deficit without any reserve setting up, and it is optional with the carrier as to whether you carry depreciation on your roadway.

Q. The reason we did not carry it was because we could not?

A. We could not, and it is not the policy of the short lines where the deficits are so large to carry depreciation or reserve, as the case may be.

Q. In other words, it would show a worse looking oper-
263 ating statement than if they were charged in?

A. Yes, sir; and I might also add that Mr. Hewitt, one of the traveling examiners, suggested that we leave out that depreciation; that our road was not in shape to carry a reserve.

Q. Now, let us take the elements with reference to the reserve that are most vital. How long does a crosstie last down there in the section where you are?

A. Between four and four and a half years.

Q. What does the commission say should have been set up as a reserve for that?

A. Our ties are depreciated 50 per cent.

Q. From what figures to what figures, please?

A. That is the difference between the cost of production and the value, less depreciation, or the ties to reproduce is $60,918; and deduct depreciation would allow a value of $30,460. In other words, this $30,460 represents the value of the ties as of that date, the date of inventory. If they were new, they should be worth $60,000. Or, in other words, we should have had a reserve of $30,000 set up as of that date to cover replacement.

Q. Mr. Fush, will you please tell the commission whether or not a reserve of that kind in the section where the Fernwood &
264 Gulf is now located would be at all adequate at the present price of ties to replace the needed ties?

A. Will you repeat that question again?

Q. Read the question, please.

(Question read as above recorded.)

A. No; because in the fluctuation of prices the cost of ties has gone up at least 70 per cent since this date.

Q. Due to our conditions down there, what has been our policy with reference to ties?

A. We just buy them and put them in as we need them. In case we would have a wreck of some kind we would have to put ties in, and we would go and buy some ties.

Q. Please state to the commission whether or not this railroad has been able to keep up its ties in the condition it ought to have kept them up; and if it has not, why it has not?

A. Well, to be frank with you, we did not have the money.

Q. How many new ties are needed on your road right now?

A. The last estimate I figured on that, we should now figure 73 per cent to put the road up in proper shape. In other words, figuring the amount of ties and four years since we bought the ties, the ties have practically worn themselves out.

Q. In other words, three out of every four of your ties, in the normal course, would need replacing now?

265 A. Correct.

Q. How much approximately would that cost at present prices?

A. Well, a crosstie that we use laid down in the track is close to 61 or 62 cents.

Q. How many to the mile are there?

A. The average, as I remember it, is 2,800 ties to the mile. I am not sure about that.

Q. About three thousand?

A. Maybe three thousand. That is just my estimate. I really don't know. Three thousand ties.

Q. Let us take another one of the items of rapid depreciation; what is the condition of your bridges?

A. According to the commission's report, the cost of new bridges was $97,194. Deduct proper depreciation would make a value of $56,713, which is practically 42 per cent that we should have set up to cover replacements or reserve for bridges.

Q. Let us take the actual facts as to our bridges; what shape are they in?

A. They are in bad shape; some of them are. I know particularly there was an accident come up this past week. We had a washout down there due to the excessive rains, and a part of our bridge, or rather the part leading up to the bridge there, an old dam,
266 broke loose, and to get the track up quick we got a man there from the Illinois Central to come out and suggest the quickest way to get the thing up.

Q. Who was that?

A. Mr. Stockton.

Q. Tell the commission what really happened.

A. He came up and said the best way would be to get his crane and pick up the engine, but he said the bridges he had seen from coming out on the track were in such condition that they would not stand for his equipment going over them, and we would have to use other means.

There are other bridges farther out toward Knoxo, at Tylertown, that are in bad shape.

Q. Where was that engine that they were going to pick up?

A. About thirty feet down in the ground.

Q. You had, then, a very serious wreck on your road?

A. We did. I imagine, not figuring on any personal damages that may arise, that it will come close to $10,000 to clean everything up and put it all back in shape.

Q. With regard to the derailments on your line, are they frequent now, comparatively speaking, or not?

A. I don't like to talk about our road so much, but we have had an average of wrecks of one a month. As to the derailments,
267 the track kind of spreads, the ties loosen up, and the engine goes onto the ground, and there is a three or four hours' delay. But this last wreck has been the worst we have had for a couple of years, and just two days before the wreck I was speaking of there were two derailments right there in one night in the yards, ties that ought to have been in there, but we just couldn't get the ties and didn't have the money to pay for them.

Q. Talking about the money to pay for them, how much bills payable has your railroad now, and why has it got them?

A. Well, we have bills payable here, for instance, of $20,000; that is just some money borrowed from the banks to keep up the pay roll and such things as that.

Q. Pay roll and what else?

A. And incidental items that come up every month.

Q. Taxes?

A. Taxes. That will be increased about the first of the year if our taxes pile up on us to about $40,000 the first of the year.

Q. Have you any reserve set up for your taxes?

A. We have a reserve, yes; but it won't be sufficient to meet the taxes; as they develop that country down there, build schools, and so forth, the taxes go up at least 15 or 20 per cent a year.

268 Q. Are you going to have the money to pay your taxes this year, or have you got to borrow?

A. I have to borrow at least 50 or 60 per cent of the amount I will pay, because this wreck will take all our current funds.

Q. This $20,000 that you have already borrowed, what was that utilized for?

A. Well, just practically current expenses as they come up. We had to pay some bills, something we had bought, or due for labor, and we did not have any money in the bank, and we just went ahead and borrowed it so we would have it.

Q. It is actually for your current expenses?

A. That is what it is; yes, sir.

Q. Have you an exhibit of that situation down there?

A. Yes, sir. I will introduce as——

Q. Just a moment before getting to that. Let us return for a moment to your valuation. Are there any other figures in the valuation report that you desire to call the commission's attention to?

A. I have the commission's comments, or rather the description of the characteristics of the road, that I would like to introduce as an exhibit.

Q. All right, sir.

Exam. SMITH. Now, right there, have you anything from
269 the commission, or is that the report of the commission, or is that merely the report of the engineers in charge to the commission, on which the commission's report will ultimately issue?

Mr. GREEN. Your honor is correct in his definition; this is the report of the engineers to the commission.

Exam. SMITH. And has that been accepted by your road?

Mr. GREEN. Yes, sir.

The WITNESS. Yes.

Exam. SMITH. You have concurred in that?

Mr. GREEN. Yes, sir.

Exam. SMITH. So that there is no contest between the road and the valuation engineers?

Mr. GREEN. No, sir. In fact they gave us a little more as I understand it than possibly our books showed.

Exam. SMITH. And if the commission agrees to that, that will be the commission's report?

Mr. GREEN. In that aspect of it.

Exam. SMITH. Yes.

Mr. GREEN. Yes, sir.

Exam. SMITH. But there is nothing from the commission as yet?

Mr. GREEN. As yet; no, sir.

The WITNESS. The tentative valuation has been issued,
270 and as far as the engineering report is concerned we have accepted it. That is where I got that docket number; I think it was 54 instead of 14. I will introduce this exhibit in evidence.

Exam. SMITH. That is from the record of the engineers to the commission?

The WITNESS. Yes, sir.

Exam. SMITH. And as I understand it the road concurs in that report?

Mr. GREEN. Yes, sir.

Exam. SMITH. Make no exception to it?

Mr. GREEN. No, sir.

Exam. SMITH. So you really introduce this as your own testimony?

Mr. GREEN. Yes, sir.

Exam. SMITH. It will be received.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 16, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) I wish you would turn to the exhibit you had just a moment ago, and we will resume our discussion of it. You have, as I understand it, bills payable of $20,000?

A. Yes, sir.

271 Q. I will ask you to introduce it as the exhibit covering the balance sheet of the Fernwood & Gulf for the month of June, 1919, showing the liability side.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 17, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) You have a capital stock there of $100,000?

A. Yes, sir.

Q. Have any dividends ever been paid on it?

A. None whatever.

Q. You have a first mortgage bond issue of $450,000; what interest does it bear?

A. Well, the bond interest has been paid on that.

Q. What interest rate does it bear?

A. How is that?

Q. What interest rate do the bonds bear?

A. Six per cent.

Q. All have been paid, or is any of it in default?

A. No; the interest has been paid. They won't accrue until 1930, but there is no reserve sinking fund set up for the payment of them when they mature.

Q. There is no sinking fund at all?

A. No, sir.

Q. Now, note on equipment, $58,000; what equipment is that?

272 A. That is the equipment we are now using, the engines and box-car and flat-car equipment. We were not in a position to pay for it, so we just gave our note, and we found somebody that would trust us that way and carry our paper.

Q. You have got a traffic and car service balance payable of $3,319.72, and audited accounts and wages payable of $11,173.83?

A. That traffic and car service balance total represents items that we owe foreign lines, or lines that we do business with.

The audited accounts and wages payable represent vouchers that are payable. Also pay-rolls, the major portion of that being pay-roll items.

Q. This exhibit is correct?

A. Yes, sir.

Q. Have you the asset side?

A. Yes, sir.

Q. Please introduce that.

A. I will introduce Exhibit No. 18, being the general balance sheet of the Fernwood & Gulf Railroad for the month of June, 1919, assets.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 18, Witness Fush," and is forwarded herewith.)

273 Q. (By Mr. GREEN.) The total amount of cash you had on hand as of that date was $7,000, about, with which to pay these liabilities?

A. Yes, sir.

Q. And you have had an accident, as I understand it, down there, in which one man was killed, two hurt, and the property damage alone will approximate $10,000?

A. Yes, sir; that is correct.

Q. This exhibit of assets represents your property value down there as carried on your books?

A. Yes, sir.

Q. I will ask you whether or not you have taken the trouble to figure out the estimated loss as of the period of the end of operation; and if so, make an exhibit with reference thereto.

A. Yes, sir.

Exam. SMITH. Let me see now, is he going to offer an exhibit showing what his calculation is as to the ultimate loss in this operation?

Mr. GREEN. Your honor, I think it would be better to get that exhibit and show it to you. In other words, in 1931 it shows where we will land on this proposition, when we haven't any more timber.

The WITNESS. In our Exhibit No. 13 or 14, whatever one it

274 was, Mr. Examiner, we have an exhibit showing that a shipper that controls 85 per cent of the uncut timber will be cut out in ten years. We have extended it for two more years to take in any stuff that may accumulate; and also due to Exhibit No. 14, where

we show our forest products as 92 per cent. So we want to introduce an exhibit here showing that in 1931, or twelve years from date, we will not have sufficient tonnage to continue.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 19, Witness Fush," and is forwarded herewith.)

Exam. SMITH. I would not elaborate on that too much. The exhibit speaks for itself.

The WITNESS. In preparing this exhibit——

Mr. GREEN. The examiner has expressly said that the exhibit shows for itself, and I think on its face it shows what it is, Mr. Fush.

Exam. SMITH. Your lumber will be gone; that is really the basis of that exhibit, is it not?

Mr. GREEN. Yes, sir. Have you made an analysis of your profit-and-loss account?

The WITNESS. Yes, sir.

Q. (By Mr. GREEN.) I will ask you to introduce that exhibit, please, sir.

A. That will be Exhibit No. 20.

275 (The document was thereupon received in evidence, marked "Defendants' Exhibit No. 20, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) That exhibit is correct, is it not?

A. That exhibit is correct. It is taken from the records as reported to the Interstate Commerce Commission, with the exception of the period of 1919, which will not go to them until the end of this year.

Q. Have you made an exhibit of that, entitled "Capital"?

A. Yes, sir.

Q. I will ask you to introduce it, please.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 21, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) State whether or not it is correct.

A. It is correct. It is taken from the records as reported to the Interstate Commerce Commission, with the exception of 1919, which will go to them at the end of this year.

Q. On the assumption of ceasing to operate them, at the time heretofore indicated, have you made an exhibit of the salvage available?

A. Yes, sir.

Q. And upon what basis was that salvage figured?

A. That salvage was based on the prices allowed by the

276 engineers of the Interstate Commerce Commission, which was shown in Exhibit 16.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 22, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) I will ask you, please, whether you have made an exhibit with reference to the estimated results of operation up to

June 30, 1931, assuming the facts heretofore stated as to ceasing operations as of that date to be true, and if so, please introduce that exhibit.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 23, Witness Fush," and is forwarded herewith.)

A. I have prepared Exhibit No. 23, showing the estimated results up to June 30, 1931, applied in connection with the necessary reserves required to protect the original average investment.

Q. (By Mr. GREEN,) Mr. Fush, I notice on Exhibit No. 23, that you have there listed Exhibit 4, Exhibit 3, Exhibit 7, and Exhibit 2. Now, your exhibit number having been changed, I will ask you to give to his honor the correct numbers to be inserted at those several points.

Mr. HUMBURG. Old Exhibit No. 4 is what?

The WITNESS. No. 4 is now 21.

277 Mr. HUMBURG. And old Exhibit No. 3?

The WITNESS. It is now No. 22.

Mr. HUMBURG. And old Exhibit No. 7 is what?

The WITNESS. 17.

Mr. HUMBURG. And old Exhibit No. 5?

The WITNESS. It is now Exhibit No. 20.

Mr. HUMBURG. And old Exhibit No. 2?

The WITNESS. It is now Exhibit 19.

Q. (By Mr. GREEN.) Have you any other exhibits, Mr. Fush? If so, state what they are and introduce them.

A. I have an exhibit here showing the results of operation during the period of reparation which I will introduce as Exhibit No. 24.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 24, Witness Fush," and is forwarded herewith.)

The WITNESS. This exhibit will show the actual results of operation, and what additional loss we would sustain if we did not have this plus charge. Or in other words, if we did not have the plus charge we would have lost $18,000.

Q. (By Mr. GREEN.) As I understand this case, if the arbitraries on the other commodities other than lumber were withdrawn, the operating deficit would be increased?

278 A. There is no doubt of it.

Q. Can you tell the commission approximately how much the operating deficit would have been increased if these arbitraries on the other commodities had been withdrawn?

A. No, sir.

Exam. SMITH. That would be a guess at the best.

Mr. GREEN. All right, sir. As I understand this exhibit, the net result of operation for the last two years is that with this arbitrary we have lost $6,192.18?

The WITNESS. Yes, sir.

Q. (By Mr. GREEN.) And if we had our arbitrary taken away from us, we would have lost approximately $18,000, or nearer $19,000?

A. That is correct. This exhibit does not bring out any other reserves that should go in there for replacement, such as ties or other items that go into roadway. They are not included in there. The only reserve set up is for the equipment.

Q. Have you any reserve set up in there to pay for accidents?

A. No, sir.

Q. Have you any other exhibits, Mr. Fush?

A. I have one exhibit here showing the amount of tonnage in pounds from all points on the F. & G. between Kokomo and Fernwood during the reparation period.

279 Q. That is, on which this arbitrary would be applicable?

A. Yes, sir. I will introduce that as Exhibit No. 25.

(The document was thereupon received in evidence, marked "Defendants' Exhibit No. 25, Witness Fush," and is forwarded herewith.)

Q. (By Mr. GREEN.) Is there anything else you wish to say, Mr. Fush?

A. No; I think I have said enough.

Cross-examination:

Q. (By Mr. PALMER.) Mr. Fush, this last Exhibit No. 25, without going into the figures in detail, shows that the Swift Lumber Company is the largest individual shipper located on your line. In other words, it shows from July 2, 1917, to July 2, 1919, that it shipped 65,000,000-odd pounds out of a total of 109,000,000 pounds. Isn't that correct?

A. That is correct.

Q. In Exhibit No. 19 you have estimated what effect the exclusion of your 2 cents plus charge would have up to the end of your operating period in 1931. That is based on the theory that the local tonnage would be the same as it is at present?

A. Yes: I went four years back and used an average, which is the usual way in preparing exhibits into the future; go back into the past.

280 Q. Then, if the Swift Lumber Company should cut out before that time and you lost that important volume of tonnage, you would be operating at a loss anyhow, apparently, would you not?

A. To a certain extent; yes.

Q. This period to June 30, 1931, you selected because that is the probable life of the operation of your principal shipper, the Fernwood Lumber Company?

A. I took the statement of the Fernwood Lumber Company, which they claimed to be ten years, and I extended it to twelve years, so if there would be any lap over it would be taken in.

Exam. SMITH. Does not that period also cover the term of your bonds?

The WITNESS. Yes, sir.

Exam. SMITH. Your bonds fall due within that period, do they not? About 1930, isn't it?

The WITNESS. 1934.

Q. (By Mr. Palmer.) That traffic is logs—that is, the shipments you get from the Fernwood Lumber Company—is it not?

A. It will be less after ten years.

Q. No. I say it is logs, is it not?

A. No; it is shown there as lumber entirely. I might say
281 that we handle logs for the Fernwood Lumber Company, and also handle lumber. In fact, we handle anything anybody wants to ship or to handle.

Q. They log their material over your line, the Fernwood & Gulf, do they not?

A. Everything moves, yes, as far as forest products are concerned. Of course we don't handle all freight.

Q. Is that log movement for the Fernwood Lumber Company's mill included in this statement of tonnage in your Exhibit No. 25?

A. No, sir. That does not include any Fernwood Lumber Company at all. That is just outside, like I made the statement between Fernwood and Kokomo.

Q. Then with the exception of the timbers, say, of the Swift Lumber Company and these other small operations, or their reduction to a minimum, the principal support of the Fernwood & Gulf would come, would it not, from the logging of the Fernwood Lumber Company? That would be its principal traffic?

A. Logging?

Q. Yes.

A. Not necessarily; no. We would have lumber from other shippers. In fact, there is one shipper going to open up around near Barto there, that may well offset what Swift ships from Knoxo. And there is hardwood there around the Bogue Chitto River;
282 perhaps you are familiar with it.

Q. So, then, you are figuring on other lumber traffic developments?

A. Yes, sir; he has close to 10,000,000 feet.

Mr. PALMER. If one of the shippers that holds 85 per cent of the tonnage will be cut out in ten years, we will assume that that 10,000,000 feet between now and ten years from now ought to be removed. I believe that is all.

(Witness excused.)

Mr. GREEN. Your honor, there is just one more witness, Mr. McElroy, whose testimony I wanted to offer, but what he would swear to is substantially what Mr. Sheppard would testify to as to this situation. I do not want to consume any more time. He is here to say that that would be the fact substantially, and I don't know whether it is necessary to introduce him or not.

Exam. SMITH. Mr. Palmer, have you any objection to conceding that Mr. McElroy would testify substantially along the line that Mr. Sheppard has already testified?

Mr. PALMER. Not the least in the world. I am satisfied he would.

T. J. QUIGLEY was called as a witness, and, having been duly sworn, testified as follows:

Direct examination:

283 Q. (By Mr. GREEN.) Name, age, residence, occupation, please, sir.

A. T. J. Quigley; 36; residence, McComb, Mississippi; superintendent for the Illinois Central.

Q. How long have you been a railroad man, Mr. Quigley?

A. Since 1905.

Q. Are you competent to testify to the facts I am going to ask about with reference to the Fernwood & Gulf?

A. I think so.

Q. Have you been over the Fernwood & Gulf recently, Mr. Quigley?

A. Yes, sir.

Q. Please state the cause for your visit.

A. I went over there with a view of familiarizing myself more particularly with the conditions which existed along that line, as to the future prospect of the railroad and the available tonnage along the railroad, and also to get some idea as to the physical condition of the railroad, the operating conditions.

Q. From your investigation, just tell us in your own way what you found.

A. The Fernwood & Gulf Railroad is essentially a lumber railroad, very similar to a number of others in that country which de-
rive practically all of their tonnage from a log movement to
284 some principal mill located on the line. So far as I could determine, with the completion of the log cut, both the hardwood, which lies in a few river bottoms and slashes along the line, and the pine timber, there will not be 10 per cent of the available contributing country subject to development within a very extended period, so far as I could see.

My estimate of the maximum tonnage possible, with the logs removed, would be not to exceed $20,000 per year for revenues, which, in my opinion, would be very much less than the operating expenses, aside from the maintenance. The road is not being maintained to the standard that it should be, both in the tie and bridge conditions. Their rail condition is fair and, so far as I could see, would be suitable for second-hand relay rails if the road was taken up at the time of the ceasing of the log operations. With the exception of the rail and a few locomotives there would be no junk value in the property.

Q. Have there been any demises recently down there of lumber railroads like this?

A. Yes, sir.

Q. Rather disastrous?

A. Yes, sir. I am now operating a twenty-mile line in which in operating expenses alone we are losing about $1,500 a
285 month. That is our line from Brookhaven to Monticello.

Q. What road used to be just north of this road?

A. The Liberty White.

Q. Where has it gone?

A. It has been junked. The east end is junked and the west end is still in operation, I understand, by the action of some residents of Liberty, who put up the deficiency to enable them to haul their cotton out.

Q. Is it run regularly as a railroad or just now and then?

A. Their success in continuous operation has not been very good.

Q. About how often a week do they run?

A. I couldn't say. They try to run every day, but they do not make it.

Q. Now, the road right below there?

A. The Kentwood & Eastern?

Q. Yes; the part where the timber was cut out; what happened to it?

A. They took up the narrow-gauge line on the K. & E., due to the fact that there was no timber, and they were having a big loss in their operation.

Q. Those are, then, gathered unto their fathers?

A. Yes, sir.

Mr. GREEN. That is all.

286 Exam. SMITH. Any questions, Mr. Palmer?

Mr. PALMER. No.

Exam. SMITH. You are excused.

(Witness excused.)

Mr. GREEN. That is all so far as the Fernwood & Gulf is concerned, your honor.

Exam. SMITH. Anything further?

Mr. HUMBURG. Nothing further from us.

Mr. PALMER. There is just one little loose end that I want to ask Mr. Sheppard about. Did you say in your testimony, Mr. Sheppard, that those three roads up north, I think the Sardis & Delta, the Kosciusko & Southeastern—and what was the third one?

Mr. SHEPPARD. The Batesville & Southwestern.

Mr. PALMER. The Batesville & Southwestern, yes; the lumber business on those lines is hardwood?

Mr. SHEPPARD. No, the Sardis & Delta and the Batesville & Southwestern are hardwood roads, and the Kosciusko & Southeastern is practically all pine.

Mr. PALMER. That is what I wanted to get at.

Exam. SMITH. Have you anything further, Mr. Palmer?

Mr. PALMER. There is another loose end I might mention. In that list I made, of mills on the roads in this territory, I said it was

made from the Red Book. There is one little explanation I
287 might make there; it does show two or three mills as located on the Kentwood & Eastern, but they were on the narrow gauge line that was torn up, and they were not taken out of the book, so that if anybody goes to check me up on that he will find an apparent discrepancy, and I wanted to make that explanation.

Exam. SMITH. I doubt if anybody is going to charge you with intentional misrepresentation. Does that conclude this case, gentlemen?

Mr. HUMBURG. That is all, so far as the Federal roads are concerned.

Exam. SMITH. Will there be desire for argument before the commission?

Mr. HUMBURG. That depends somewhat upon the nature of the tentative report.

Exam. SMITH. I doubt if the report can satisfy all parties.

(A discussion followed off the record.)

Exam. SMITH. The record may show that briefs for all parties will be due February 1st; that oral argument is requested; 90 minutes in all. With that understanding gentlemen, the hearing is closed.

(Whereupon, at 11 o'clock a. m., December 19, 1919, the hearing in the above entitled matter was closed.)

289 *Exhibit E to bill of complaint.*

Interstate Commerce Commission.

Mailed by Interstate Commerce Commission March 29, 1920.

SWIFT LUMBER COMPANY
vs.
FERNWOOD & GULF RAILROAD COMPANY, DIRECTOR GENERAL, et al. } No. 10827.

It is proposed that the commission find:

That for the future rates on lumber from Knoxo, Miss., a local point on a short line, the Fernwood & Gulf Railroad, to interstate destinations which exceed rates from Fernwood and Tylertown, Miss., the junction points of the short line with main line carriers, by more than 2½ cents per 100 pounds will be unreasonable and will subject Knoxo to undue prejudice and disadvantage.

L. Palmer for complainant.
Green & Green for Fernwood & Gulf Railroad Company.
George B. Auburtin for New Orleans Great Northern Railroad.
A. P. Humburg and J. L. Sheppard for defendants.

REPORT PROPOSED BY J. EDGAR SMITH, EXAMINER.

Complainant corporation, engaged in the manufacture of lumber at Knoxo, Miss., ships its product over the Fernwood & Gulf Railroad to various interstate destinations reached by trunk line connections of that carrier. By complaint filed July 2, 1919, it alleges that the rates on yellow-pine lumber from Knoxo to points in Louisiana and to points in certain States to the north and east of Mississippi are unreasonable and unjust; and that these rates, as compared with rates on the same commodity from competing points in the territory surrounding Knoxo, are in violation of sections 1, 2, and 3 of the interstate commerce act. Reparation is asked. Rates are stated herein in cents per 100 pounds.

At the hearing the allegations concerning rates to points in Louisiana were abandoned and the evidence was directed to rates to Ohio River crossings, to points to which rates are made in relation to the rates to those crossings, and to rates to points south of the Ohio and Potomac Rivers.

290 The complaint is based upon the theory that there is, or should be, a rate blanket on yellow pine lumber from all lumber producing points south of the Alabama & Vicksburg Railroad and east of the Mississippi River for about 200 miles; that a group adjustment does apply from most of the producing points in said territory; and that Knoxo, and a few other points, are subjected to undue prejudice in that the rates from Knoxo, and from these other points, exceed the group rates from this territory.

The Fernwood & Gulf Railroad is a single track line of standard gauge, 32 miles long, which extends northeasterly from a connection with the Illinois Central Railroad at Fernwood and lies wholly within the State of Mississippi. Knoxo is 27 miles from Fernwood. At Tylertown, a point 6 miles west of Knoxo, the Fernwood & Gulf connects with a branch of the New Orleans Great Northern Railroad. Fernwood and Tylertown are the only junction points which the Fernwood & Gulf now has with other carriers; but the line is extending to the east and is expected to cross the main line of the New Orleans Great Northern near Foxworth and to connect with the Gulf & Ship Island near Columbia. Prior to 1908, the only trunk line connection of the Fernwood & Gulf was the Illinois Central; and prior to May 21, 1906, rates from all points on its line to all points of destination were made by adding its full local rates to Fernwood to the rates from that point to destinations. Effective that date, rates were published from local points on the Fernwood & Gulf via Fernwood which were 2 cents higher than rates from Fernwood, and this is the present basis for joint rates. Rates from Fernwood and from Tylertown via the Fernwood & Gulf do not exceed rates from those points by way of the Illinois Central or via the New Orleans Great Northern Railroad.

291 The real ground of complaint is that rates from Knoxo exceed rates from Fernwood, and therein only does complainant claim that they are unreasonable and unjust; and it is this excess

which complainant says makes the rates from Knoxo, as compared with rates from near-by competing points, unduly prejudicial to it. Throughout this territory rates to Ohio River crossings from all main or trunk line stations are the same as the rates from Fernwood. The questions presented here are substantially these: (1) May rates from stations served only by short lines of railroad exceed the group or territorial rates, and, if so, (2) by what amount? There is no allegation that the rates on yellow pine lumber from trunk line stations in this territory are unreasonable or otherwise in violation of the act.

Ever since 1905, the commission has been duly advised concerning the practices of trunk line carriers in making rates from this territory. In Central Yellow Pine Asso. v. Illinois C. R. Co. et al., 10 I. C. C. 505, 515, the commission in speaking of the particular territory here involved said:

The mills east of the Mississippi located on the lines of defendants have logging roads as well as those west of the Mississippi. The defendants as a rule, however, make no tap line allowances to those mills. The only exception is the Mobile & Ohio road, which does grant such allowance to about four mills located on its line. The new Orleans & Northwestern road has from time to time, beginning with June 28, 1897, put in a tap line allowance of 2 cents per hundred pounds, but the other roads east of the Mississippi objected, and those allowances were withdrawn.

The decision in that proceeding depended in part upon the fact set forth above; that is, that tap line allowances are exceptions to the general practice of carriers east of the Mississippi River, although the carriers west of the river generally made such allowances; and this practice east of the river the commission did not condemn. Nor has the commission condemned rates from points served by short or tap lines in this territory which are made by adding small arbitrataries to the rate from the junction point on
292 main lines. This latter matter was considered in 1914 in the Tap Line case, 31 I. C. C. 490, to which the Fernwood & Gulf Railroad Company was a party. The commission therein said:

With respect to each of the tap lines that are parties to this proceeding, the original orders of the commission and the orders subsequently entered, so far as they relate to through routes, joint rates, and divisions, will be vacated and set aside; and upon the facts of record, we conclude and find that all through routes and joint rates in effect prior to May 1, 1912, between the trunk lines and tap lines named on the record, should be restored and reestablished, and that the divisions out of the through rate on interstate shipments of lumber and forest products, from points on such of these tap lines as file tariffs and have otherwise complied with our accounting rules, etc., should not exceed the following maximum amounts: * * * on shipments from points * * * over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds. * * * These divisions are the net amounts that they may be paid out of

the trunk line rates from the junctions, and when the rates from points on the tap line are made by the addition of an arbitrary, such arbitrary shall accrue to the tap line.

Joint rates from all points on the Fernwood & Gulf, except Fernwood & Tylertown, exceed rates from Fernwood & Tylertown by 2 cents or by 2½ cents; these arbitraries accrue to the Fernwood and Gulf and in addition thereto it receives divisions out of the joint rates of 2 cents. This adjustment is within the findings made by the commission in the Tap Line case and the lower rates from Fernwood and from Tylertown were approved by fourth section Order No. 2754, of July 30, 1913, issued on petition of the Illinois Central, the New Orleans Great Northern, and the lines serving this lumber-producing territory. The Fernwood & Gulf was a party to that proceeding. In that order the commission said:

That the petitioners herein be, and they are hereby, authorized on behalf of certain smaller roads named in said applications, which are referred to and hereby made a part hereof, to continue to meet via said smaller roads, the rates of trunk line connections from the junctions points with said trunk lines to Ohio River crossings and Memphis Tenn., and to maintain rates from their local stations intermediate to said junction points that are higher than the rates
293 from the said junction points, provided that the present differences between the rates from said junction points and said intermediate points are not made greater, and to deliver traffic originating at any of the local stations on the said smaller lines to any of their trunk line connections, at any of the trunk line junction points.

The Illinois Central and Yazoo & Mississippi Valley railroads connect with 8 short line carriers in this territory, to no one of which do they extend the junction joint, or group, basis of rates on lumber. Lumber rates from local points on these short lines exceed the rates from the junction points by arbitraries varying from 1 to 4½ cents. The New Orleans Great Northern has no tap-line connections other than the Fernwood & Gulf and the Natchez, Columbia & Mobile. Its rate practices are not different from those set forth above; indeed the general practice throughout the Mississippi Valley and the Southeast appears to be to make rates from local points on tap lines by adding an arbitrary or differential to the rate from the junction point. There are 95 short lines of road in the territory east of the Mississippi and south of the Ohio River. Rates on lumber from local points on these roads are made on the differential or arbitrary basis from 55 short lines, on combinations of locals from 27, and on the junction point basis from only 13.

Rates on lumber from local points on the Fernwood & Gulf are made in substantially the same way that rates on all classes and commodities to and from such local points are made. That is to say, the rates on all classes and commodities to and from local points on the Fernwood & Gulf are higher than the rates to and from junction points such as Fernwood and Tylertown. This

general basis for rate-making to such points was in existence long before complainant established its mill at Knoxo in 1912. Indeed, complainant was well advised of the rate situation when it established its mill at Knoxo rather than at Tylertown, or some
294 other stations, on the New Orleans Great Northern; and the record indicates that in view of the rate situation at Knoxo its stumpage cost it less than would have been demanded at a main-line station.

Complainant has no affiliation with the lumber interests which control the Fernwood & Gulf; it has, however, a logging road of its own about 12 miles long. It alleges that from local stations on tap lines in this territory, the rates on lumber are the same as from junction points, and cites rates from local points on the Mississippi Central as illustrative of this. The New Orleans Great Northern and Illinois Central show that the Mississippi Central is now a carrier handling traffic other than lumber; that it built westward from Hattiesburg, where it connects with the New Orleans and Northeastern, crossing the lines of the Gulf and Ship Island before it reached their own rails at Wanilla and Brookhaven; that it had joint rates via the New Orleans & Northeastern and Gulf & Ship Island at the time connection was made with their lines; and that if they expected to handle traffic originating on that road their rates could not exceed the rates already in effect via the lines of their competitors. The complaint also alleges that the group or trunk-line basis of rates is applied from points on other short lines in this territory; from the Alabama & Mississippi Railroad, the Mississippi and Western Railroad, the Cybur, Gulf & Northwestern Railroad, and the Pearl River Valley Railroad. The Alabama & Mississippi extends from Pascagoula, served also by the Louisville & Nashville; through Evanston, where it crosses the Gulf, Mobile & Northern; to Vinegar Bend, where it connects with the Mobile & Ohio. The Mississippi and Western is a short line which connects with the Gulf, Mobile & Northern at Stevens. The Cybur, Gulf & Northern no longer exists; a part of its line is now owned by the Pearl River Valley, connecting with the New Orleans & Northeastern at Picayune. It is to be observed that none of these roads con-
295 nects with either the Illinois Central or the New Orleans Great Northern. The fact that the Illinois Central and New Orleans Great Northern concur in joint rates from points on these short lines, with which they have no direct connection, is urged by complainant as an unjust discrimination against Knoxo and as subjecting that point to undue prejudice and disadvantage. The joint rates from these short lines are made by the longer lines with which they connect and are the same as the group rates from points on such longer lines; unless the Illinois Central and the New Orleans Great Northern are free to cancel all through rates with such longer lines

they are unable to dictate to them what policy they must pursue with respect to rates from their connecting short lines. There is discrimination in such an adjustment, but it is far from unjust; there is advantage to points on such short lines, but it was not created or given by the Illinois Central or the New Orleans Great Northern and the disadvantage to Knoxo is not undue.

The record discloses that complainant established its mill for the purpose of producing lumber for export; that it located at Knoxo because of the expectation that the Fernwood & Gulf, by building to Columbia, would form a junction with the Gulf & Ship Island and thereby obtain access to Gulfport. Due to the war, complainant has, in recent years, shipped most of its lumber to points within the United States.

Defendants offer testimony tending to show that the rates from Knoxo are not unreasonable as compared with rates from other points in the South for similar distances, or as compared with the rates on lumber for similar distances in Central Freight Association territory. The Illinois Central shows that it has made rates with the Fernwood & Gulf consistent with its established policy; that its rates made in connection with the Fernwood & Gulf from points on that line were made in strict compliance with the de-
296 cisions, orders, and rules of this commission; and that it can not afford, even if the commission should permit it, to shrink its earnings by allowing larger divisions to the Fernwood & Gulf. The Fernwood & Gulf shows that its operation has been at a loss which would become much greater if rates on lumber from local points on its line should be reduced below their present level, lumber supplying 93 per cent of its total traffic.

Complainant attempted to show that while the Illinois Central and New Orleans Great Northern maintain rates on lumber from short line connections on the basis of arbitraries over the rates from junction points, such rates are largely paper rates because no lumber industries are now located on such lines. This attempt fell in the making, for the facts are that even on those short lines where the timber has been cut to such an extent that the large lumber industries have been abandoned, smaller portable mills are in operation, and ties, piling, and other articles taking the lumber rates are shipped in considerable volume. The Fernwood & Gulf has forest products shipped from its line by the lumber mill with which it is affiliated, by complainant, and by others.

Complainant cites certain decisions of the commission in support of its position: Ladd & Co. v. Gould Southwestern Ry. Co., 36 I. C. C. 179; Lutcher & Moore Lumber Co. v. T. & N. O. R. R. Co., 42 I. C. C. 88; Cybur Lumber Co. v. N. O. & N. E. R. R. Co., 43 I. C. C. 268; McGowan-Foshee Lumber Co. v. F. A. & G. R. R. Co., 43 I. C. C. 581; Pacific Lumber Co. v. N. W. P. R. R. Co., 51 I. C. C.

738; Three Lakes Lumber Co. v. N .W. Ry. Co., 52 I. C. C. 42; and Lodowick Lumber Co. v. Director General, 53 I. C. C. 218. All of these decisions except those in the Cybur and McGowan-Foshee cases deal with group relationships west of the Mississippi River. The doctrine laid down with respect to the yellow pine group west of the river was clearly stated in the Ladd case:

297 * * * The territory in which the Gould Southwestern is located is one in which blanket rates as a rule prevail. The carriers making effective such a blanket rate can not be heard to say that it is applicable in general but not applicable from points on a short-line common carrier, such as the Gould-Southwestern. If this territory is to be blanketed, and the blanket rate is to be applied without discrimination, the Iron Mountain must expect to apply the blanket rate from points on short-line common carriers connecting with the Iron Mountain.

The general rule of decision, as applied to west coast groups, was likewise distinctly set forth in the Pacific Lumber case:

* * * The Southern Pacific and Santa Fe had followed a rather consistent policy, virtual, if inarticulate, in extending the coast group basis of rates to all points located fairly within the general geographic and distance limits of the blanket and producing lumber and other forest products in substantial volume, whether such points were served by their own main lines or branch lines or by lines of independent common-carrier roads with which they had direct connection.

No such rule, no such policy, ever existed in the central yellow-pine territory. Rates from this territory are grouped, but not blanketed. The consistent practice of the Illinois Central, with respect to rates from this territory, has been known to the commission for more than fifteen years and has never been condemned. The carriers mainly responsible for departures from this general practice, the Mobile & Ohio and the New Orleans & Northeastern, have likewise been known to the commission for the same length of time. Indeed, the Cybur case was primarily against the New Orleans and Northeastern and was based upon the fact that to Ohio River crossings joint rates the same as applied from junction points were in effect from local points on the tap line, the Cybur, Gulf, and Northwestern, whereas to other points no joint rates were made.

In the McGowan-Foshee case the commission stated that "the Louisville and Nashville applies the blanket basis from points on its own branch lines, many of which are farther removed from the destinations in issue than is Falco"; and found concerning

298 the rates from that point, on the short connecting line, that "for the future they will be unduly prejudicial to complainant to the extent to which they exceed, the blanket basis of rates from Galliver to the same destinations." Galliver is the junction point be-

tween the short line and the Louisville & Nashville. Nevertheless, the commission did not find rates from Falco 2 cents higher than from Galliver to be unreasonable.

The facts in this proceeding show that the Illinois Central makes rates with all short line connections upon bases similar to that it uses to make rates with the Fernwood & Gulf, and there is no showing of unjust discrimination or undue prejudice resulting to complainant therefrom.

The complaint points out that to certain destinations there are no joint rates from Knoxo, but that through rates are made on combination of locals based on Fernwood or Tylertown. There is no specific prayer for joint rates. The lumber arbitrary over the group rates was formerly 2 cents; this is the adjustment now in rates to Ohio River crossings and beyond; to Memphis, Tenn., to New Orleans, La., and to some points south of the Ohio River this arbitrary has been increased to 2½ cents in accordance with General Order No. 28; nevertheless the record shows that to other points south of the Ohio and Potomac Rivers through rates are made upon the sums of the locals and the differences between the rates from the junction points and from Knoxo are greater than 2½ cents. For instance, to Nashville, Tenn., the rate from Knoxo, based on Fernwood, is 25½ cents, via Tylertown it is 23½ cents, from Fernwood & Tylertown the rates are 19 cents; to Knoxville, Tenn., from Knoxo, via Fernwood, it is 28 cents, via Tylertown 26 cents, from Fernwood and Tylertown, 21½ cents; to High Point, N. C., the rate via Fernwood is 37½ cents, from Fernwood 31 cents. The explanation offered on behalf of defendants is undoubtedly true; that is, that these destinations are served by near-by territories of production and,
299 the movement from points on the Fernwood & Gulf to such points being small, no joint rates are published. Complainant, however, is entitled to reasonable rates without regard to the method of publication or of making, and to add the full locals or hauls such as indicated above is clearly unreasonable.

The commission should find that the rates on yellow pine lumber from Knoxo, Miss., to the Ohio River crossings and to points basing thereon which exceed rates from Fernwood and Tylertown, Miss., by 2 cents per 100 pounds are neither unreasonable, unjustly discriminatory, nor unduly prejudicial to complainant; that rates on lumber from Knoxo to points south of the Ohio and Potomac Rivers which exceed rates from the junction points by 2½ cents are not unreasonable or otherwise in violation of the act; and that for the future any rates on lumber from Knoxo to other interstate destinations which exceed rates from the junction points by more than 2½ cents per 100 pounds will be unreasonable and will subject Knoxo to undue prejudice and disadvantage. Reparation should be denied.

300 *Exhibit I to bill of complaint.*

Interstate Commerce Commission.

SWIFT LUMBER COMPANY
v.
FERNWOOD & GULF RAILROAD COMPANY, DIRECTOR GENERAL, AS AGENT, ET AL. } No. 10827.

Submitted May 15, 1920. Decided April 5, 1921.

Rates on yellow-pine lumber, timber, and lumber products from Knoxo, Miss., a local point on the Fernwood, Columbia & Gulf Railroad, found unduly prejudicial to the extent they exceeded and exceed the blanket basis of rates applicable from the junction of the Fernwood, Columbia & Gulf with the Illinois Central Railroad. Rates not found unreasonable except to certain points in Tennessee. Reparation denied.

L. Palmer for complainant.
Green & Green for Fernwood & Gulf Railroad Company.
George B. Auburtin for New Orleans Great Northern Railroad Company.
A. P. Humburg and J. L. Sheppard for defendants.

REPORT OF THE COMMISSION.

EASTMAN, Commissioner:

Complainant, a corporation engaged in the manufacture of lumber and lumber products at Knoxo, Miss., ships its product over the Fernwood, Columbia & Gulf Railroad, formerly the Fernwood & Gulf, to various interstate destinations reached by trunk line connections of that carrier. By complaint, filed July 2, 1919, it alleges that the carload rates on yellow-pine lumber, timber, and lumber products to points in Louisiana, Tennessee, Kentucky, Wisconsin, Minnesota, Iowa, and Missouri, and to points in central and eastern trunk line territories have been and are unreasonable and unjust; and that these rates, as compared with rates on the same commodities from competing points in the territory surrounding Knoxo, have been and are in violation of sections 1, 2, and 3 of the act to regulate commerce. Reparation is asked on shipments made since January 1, 1919. Rates are stated herein in cents per 100 pounds, and do not include the general increase authorized by us on July 29, 1920.

At the hearing the allegations concerning rates to points in Louisiana were abandoned. Rates to Ohio River crossings are of primary importance, as the rates to points beyond are based upon the Ohio River combination.

301 The complaint rests upon the theory that a rate blanket on yellow-pine lumber covers the territory extending south from the Alabama & Vicksburg to the Gulf and east from the Mis-

sissippi River for a distance of about 200 miles, and that Knoxo and a few other points located within this territory are subjected to undue prejudice because their rates exceed the blanket rates.

At the time of the hearing the Fernwood & Gulf, a single-track line of standard gauge, extended from a connection with the Illinois Central at Fernwood, Miss., eastwardly for 32 miles. Knoxo is 27 miles from Fernwood. At Tylertown, a point 6 miles west of Knoxo, there is a connection with a branch of the New Orleans Great Northern. Fernwood and Tylertown were the only junction points with other carriers at the time of the hearing, but the line has since been extended 12 miles eastwardly through Foxworth, Miss., where it connects with the main line of the New Orleans Great Northern, to a connection with the Gulf & Ship Island at Columbia, Miss. It is now known as the Fernwood, Columbia & Gulf, but will be referred to hereinafter as the Fernwood & Gulf.

The Fernwood & Gulf was formerly owned by the Fernwood Lumber Company, but upon the complete separation of the lumber company and the railroad company we entered an order on December 21, 1914, vacating our orders in the Tap Line case, 23 I. C. C. 277, 549, 31 I. C. C. 490, in so far as they related to the Fernwood & Gulf, and dismissed it from that proceeding.

Prior to 1908 the only trunk line connection of the Fernwood & Gulf was the Illinois Central, and prior to May 21, 1906, lumber rates from all points on its line to all destinations were made by combining its full local rates to Fernwood with the rates beyond. Effective on that date, rates were published from local points which were 2 cents higher than the rates from Fernwood, and this is the present basis for joint rates to Ohio River crossings and points beyond. To Memphis, Tenn., New Orleans, La., and some other points south of the Ohio River, this arbitrary has been increased to 2.5 cents in accordance with General Order No. 28 of the Director General of Railroads. To certain points in Tennessee there are no joint rates from Knoxo and the applicable combination rates, based on Fernwood, exceed the junction-point rates by more than 2.5 cents. Rates from Fernwood and Tylertown via the Fernwood & Gulf do not exceed the respective rates from those points by way of the Illinois Central or the New Orleans Great Northern. The arbitraries over the junction-point rates accrue to the Fernwood & Gulf and in addition it receives a division of 2 cents per 100 pounds out of the joint rates.

302 It is not and has not been the practice of defendants Illinois Central and New Orleans Great Northern to extend the junction-point, or blanket, basis of rates on lumber to points on short-line railroads in this territory. The Illinois Central and its affiliated line, the Yazoo & Mississippi Valley, connect with eight such short-line carriers and none of them has the blanket rates. Lumber rates from local points on these short lines exceed the rates from the junction points by arbitraries ranging from 1 to 4.5 cents. The New Orleans Great Northern has no short-line connections other

than the Fernwood & Gulf and the Natchez, Columbia & Mobile, and to neither does it extend the blanket rates. Indeed, the general, although not the universal, practice throughout the Southwest appears to be to make rates from local points on independent short lines by adding an arbitrary to the rate from the junction point. There are 95 such carriers in the territory east of the Mississippi and south of the Ohio referred to in this record, and rates on lumber from local points on these roads are made on the arbitrary basis in 55 cases, on combinations of locals in 27, and on the junction-point or blanket basis in but 13.

Complainant states that from local stations on certain short lines in this territory the rates on lumber are the same as from the junction points, and mentions rates from such points on the Mississippi Central, the Alabama & Mississippi, the Mississippi & Western, the Cybur, Gulf & Northwestern, and the Pearl River Valley.

Defendants New Orleans Great Northern and Illinois Central show that the Mississippi Central is now 160 miles in length; that it handles considerable traffic other than lumber; that it had joint rates on the junction-point basis with the New Orleans & Northeastern prior to the establishment of connections with the New Orleans Great Northern at Wanilla, Miss., and with the Illinois Central at Brookhaven, Miss.; and that they were forced to extend the blanket rates to it because of this competition.

The Alabama & Mississippi extends from Pascagoula, Miss., served also by the Louisville & Nashville, through Evanston, Miss., where it crosses the Gulf, Mobile & Northern, to Vinegar Bend, Ala., where it connects with the Mobile & Ohio. The Mississippi & Western is a short line which connects with the Gulf, Mobile & Northern at Stevens, Miss. The Cybur, Gulf & Northern no longer exists. A part of its line is now owned by the Pearl River Valley, connecting with the New Orleans & Northeastern at Picayune, Miss. It is to be observed that none of these roads connects with either the Illinois Central or the New Orleans Great Northern, yet both these defendants concur in joint rates on the blanket basis from local
303 points on these short lines. It appears, however, that if the Illinois Central and the New Orleans Great Northern should refuse to concur in these joint rates, similar rates would still apply to most destinations via other routes.

Practically all of the yellow-pine production on the Illinois Central and the affiliated Yazoo & Mississippi Valley is in the territory south of the line of the Alabama & Vicksburg, and from all points in this territory, both on their main lines and on their branch lines, the Illinois Central and Yazoo & Mississippi Valley blanket their rates on yellow-pine lumber and its products to Ohio River crossings and points taking the same rates; to the territory beyond the Ohio River crossings, including eastern and Virginia cities; and to points in Kentucky and Tennessee on their own lines and on the lines of certain other carriers. Points on the main line and branch lines of the New Orleans Great Northern are similarly blanketed.

The Fernwood & Gulf is well within this blanket territory and nearer to the northern boundary than to the southern. The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of New Orleans on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch, but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the main line of the former road at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distances to Memphis, Tenn., through which point most of the traffic with which we are here concerned moves, are 115 miles greater via Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown, and 96 miles greater by way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory.

Defendants submitted evidence tending to show that the rates from Knoxo are not unreasonable as compared with rates for similar distances from points in the South on other short lines, or as compared with the rates on lumber between certain points in central territory for similar distances. In support of its allegation
304 of unreasonableness complainant relies upon the comparison of the Knoxo rates with those from the blanketed points.

The Illinois Central states that it can not afford to shrink its earnings by allowing larger divisions to the Fernwood & Gulf, but in this connection it may be observed that the division accorded by it to the Mississippi Central was 6 cents per 100 pounds at the time of the hearing, and that under our sixth supplemental order in the Tap Line case, supra, a maximum division of 5 cents per 100 pounds may be allowed to a tap-line common carrier on shipments from points over 20 miles and not more than 40 miles from the junction, this being in addition to any arbitrary over the junction-point rate. The Fernwood & Gulf shows that it has operated at a loss, and that the loss would be greater if its revenue on lumber were reduced by the amount of the arbitrary, since lumber supplied 93 per cent of its total traffic.

The material facts in this case are the same as those in McGowan-Foshee Lumber Co. v. F., A. & G. R. R. Co., 43 I. C. C. 581; 51 I. C. C. 317. In that case it was shown that rates on yellow-pine lumber from all points located on the Louisville & Nashville and

other so-called trunk lines and on certain short lines in Louisiana, Mississippi, Alabama, and Florida, between the Mississippi and Chattahoochee Rivers, and between the Gulf of Mexico and a line drawn from Vicksburg, Miss., through Jackson and Meridian, Miss., Selma, Montgomery, and Opelika, Ala., to the Chattahoochee River, were blanketed to Ohio River crossings and to destinations in Kentucky and Tennessee and in central and trunk line territories; that from Falco, Ala., the northern terminus of the Florida, Alabama & Gulf, which connects with the Louisville & Nashville at Galliver, Fla., 26 miles from Falco, joint rates to said destinations were made 2 cents or 3.25 cents over the junction-point, or blanket, rates; that while the distance from Falco to Cincinnati, Ohio, a typical destination point, is slightly greater than the average weighted distance from the Louisville & Nashville blanket points, Falco is well within the limits of the blanket; that there were numerous so-called short lines traversing the blanket territory and connecting with the Louisville & Nashville, to none of which the blanket rates were extended; and that it was the general policy of the Louisville & Nashville to make the rates from points on short lines like the Florida, Alabama & Gulf higher than the rates from the junction points. We found that the rates from Falco were, and since January 1, 1916, had been, unreasonable and unduly prejudicial to complainant to the extent that they exceeded or had exceeded the rates from Galliver by more than 2 cents per 100 pounds, and that for the future they would be unduly prejudicial to complainant to the extent to which they
305 exceeded the blanket basis of rates from Galliver to the same destinations.

The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers, and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefit to these other short-line points and specifically, in this case, to Knoxo on the line of the Fernwood & Gulf.

Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense, but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competi-

tion serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.

If neither cost of service nor competition justifies the discrimination, what circumstances are there surrounding points located, like Knoxo, on independent short lines which make it reasonable that they should be excluded from the benefits of the blanket system? It has been suggested that the lumber shipper on the short line may have acquired his stumpage more cheaply by reason of its relative inaccessibility prior to the construction of the short line, or by reason of the difference in rates; but there is no satisfactory evidence as to this and such evidence would obviously be irrelevant and immaterial in the consideration of a rate structure. It is suggested that the independent short lines are likely to be abandoned with the depletion of the timber areas; but this is mere speculation. Branch lines of the larger carriers are at times abandoned for the same reason, and on the other hand independent short lines not infrequently survive as the original lumber industry is superseded by agriculture or other industrial development. Many of the so-called trunk
306 lines in the region in question are made up in part of what were originally lumber roads. It is suggested that the short lines do not furnish their commensurate quota of equipment; but this is a matter to be considered in the fixing of their divisions. Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points.

We find nothing of record in this case which warrants a deviation from the conclusions reached in McGowan-Foshee Lumber Co. v. F., A. & G. R. R. Co., supra. We do not find that the rates on yellow-pine lumber, timber, and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable, except that we find that the rates to points in Tennessee, which were made by combination of the local rates to and beyond Fernwood, were unreasonable to the extent that they exceeded the corresponding contemporaneous rates from Fernwood to the same destinations by more than 2.5 cents per 100 pounds. We do find, however, that subsequent to January 1, 1919, the rates on yellow-pine lumber, timber, and lumber products from Knoxo to Ohio River crossings, to points in Wisconsin, Minnesota, Iowa, and Missouri, to points in central and eastern trunk line territories, and to points in Tennessee and Kentucky the rates to which are blanketed from points producing yellow pine on the Illinois Central and New Orleans Great Northern Railroads south of Jackson, Miss.,

were, and that for the future they will be, unduly prejudicial to complainant to the extent that they exceed the blanket basis of rates from Fernwood, Tylertown, and Foxworth.

Complainant has not shown that it was damaged by the undue prejudice. It does not appear that the price which complainant obtained for its lumber was fixed by its competitors located on the Illinois Central, Yazoo & Mississippi Valley, and New Orleans Great Northern. Complainant concedes that it must also meet the competition of lumber producers located west of the Mississippi River. Complainant has shown that it made shipments to points in Tennessee upon which rates made by combination upon Fernwood were applied, but has failed to show that it paid and bore the freight charges thereon. Reparation is accordingly denied.

An appropriate order will be entered.

307 HALL, Commissioner, dissenting in part:

A rate group or blanket is not geographic. It embraces no area. It consists of certain railroad stations from or to which the rates apply. A point not on the railroad does not take those rates even though surrounded by stations that do. If, later, such a point is connected by rail with one of those stations it does not because of that fact become entitled to the group rates. Something more is needed. The connection may be by an independent line, which has had no share in evolving the group rates. It may be by a branch of the trunk line.

We have said in some cases that an arbitary over the junction point was reasonable, and in others unreasonable. In others still, as here, we have said that it was not unreasonable, but was and would be for the future unduly prejudical to the former country point. This has been said of points on independent lines because points on other independent lines were differently treated by the trunk line. It has also been said of branch-line points when points on other branches of the same carrier were differently treated. And it has been said of points on independent lines, because branch-line points of the trunk line were differently treated. Perhaps these decisions can not be reconciled. But such error as may have found lodgment in them seems to have sprung from the conception of a group or blanket as a part of the earth's surface, with defined boundaries.

However convenient this may be as a figure of speech, or in coloring a map, it should not dim our perception of the origin and essential character of "group" rates, or the reasons for their existence. They penetrate a territory, instead of embracing or permeating it, and the right of shippers within that territory to share in them must rest upon the same considerations as determine elsewhere what is unreasonable and what is unduly prejudical. It is easy to carry the doctrine of uniformity beyond the warrant for it.

Group rates find their justification largely in the law of averages. If reasonable for the average haul they may be justified in proper case, even though high for the shortest haul and low for the longest.

But the carriers that established the group did so voluntarily or under stress of competition. We had no power to compel the grouping, and in fixing the average or group rate they took into account the stations and traffic to which that rate was to apply, not other stations then nonexistent or off their rails, not traffic the volume and condition of which were unknown. If other stations must be included the group rate may need revision, and the revision may be upward. It seems unjust that shippers at points already grouped should be exposed to payment of a higher rate, or to exclusion from the group, merely because some off-line point in the vicinity
308 seeks to share in the rate whether or not it shares in the transportation conditions that led to the grouping.

Before we make a finding which may bring about results like these we should have before us a record which clearly establishes such similarity of transportation conditions and surrounding circumstances as will fully warrant it. In my opinion we have not such a record here, and I therefore dissent from the finding of undue prejudice. The complaint should be dismissed.

I am authorized to say that Commissioner Potter joins in this dissent.

DANIELS, Commissioner, dissenting:

Virtually this same issue was involved in McGowan-Foshee Lumber Co. v. F., A. & G. R. R. Co., 43 I. C. C. 581, 51 I. C. C. 317, and in Whitewater Lumber Co. v. A. C. Ry., 53 I. C. C. 278. When a trunk-line carrier over a considerable stretch of its main line carries the same rate on lumber in carloads to a given territory of destination; when, in addition thereto the same rate is carried from the trunk-line carrier's own branches connecting with the main line at points along the blanketed stretch of the main line, why is not a shipper on an independent branch line connecting with the blanketed stretch of the trunk line, when said shipper's freight is carried for distances not in excess of the average haul over the carrier's own branches under the common rate, entitled to the same common or blanket rate?

Under certain circumstances he may be so entitled. If, for example, an extensive blanket like the yellow-pine blanket territory west of the Mississippi River assimilates, under a single rate, hauls that may vary by hundred of miles, and the integrity of the blanket is defended by the carriers and justified by us on grounds of general utility to producers, consumers, and carriers alike, there could generally be no apparent justification for singling out shippers on one particular branch line, either proprietary or independent, and exacting an arbitrary surcharge over the blanket rate from shippers thereon. Ladd & Co. v. Gould Southwestern Ry. Co., 36 I. C. C. 179.

But in the absence of the conditions recited above, the issue may be determined on other grounds.

It is urged with force that the higher rate to the shipper on the independent branch line can not be justified on the ground of a difference in specific cost of service. Where the haul is no longer than from points generally on proprietary branches, the argument from specific cost would seem to support the claim for identity of rates. There will, however, be some additional costs involved in the overhead expense of the separate corporate organization of
309 the independent branch line, and the additional billing and accounting expenses may also properly be considered. McGowan-Foshee Lumber Co. v. F., A. & G. R. R. Co., 51 I. C. C. 317, 322.

There is often urged the commercial argument that the shipper on the independent branch line has bought his stumpage more cheaply by reason of its originally greater inaccessibility to markets. In many cases this is probably true, though when he secures rail connection with the trunk line it does not appear that the price originally paid for stumpage should be any bar to his receiving thereafter a reasonable and nonprejudicial rate.

Where, however, a trunk line has built a branch line, it is a fair presumption that it is the carrier's expectation that the region traversed will permanently require service and permanently offer patronage to justify the service to be rendered. This expectation of permanent patronage may justify a rate adjustment to shippers on the proprietary branch line which can not, with equal reason, be demanded by shippers whose traffic is likely to cease upon the depletion of limited quantities of natural resources such as stands of timber. The removal of timber in some instances results in a discontinuance of paying traffic. We have only recently permitted the entire abandonment of a short line and the abandonment of the greater part of another short line where the removal of timber practically rendered profitable operation impossible. What is originally a logging or mining road may prove to be a pioneer, permanently opening up new country with a steady traffic, or it may prove a commercial venture of exploitation whose operation may cease when the country has been logged over or the mine's profitable deposits have once been removed.

In this aspect of the matter there may be justification for not according the shipper on an independent branch road a blanket rate accorded for hauls of equal length on the carrier's proprietary branches. To insist upon an identity of rates as of right is to insist that some one other than the main-line carrier may determine the chances for permanent railroad operating success in a new field, and compel the main-line carrier to contribute to the success of the venture by according a parity in rates. When the independent road is virtually one in interest with a lumber company, this claimed identity of rates might approximate a forced underwriting by the trunk-line carrier of a new industrial project. Particularly is this consideration enforced by the well-known fact that such independent short-line roads rarely contribute a commensurate supply of equipment toward carrying the freight that originates jointly upon their

lines and the lines of the trunk lines including the latter's branches.

Provisions of adequate equipment and appliances by the trunk
310 line is requisite to handle the freight offered by the short line without there being in all cases any certain or probable warrant that such provision will have permanent and remunerative use.

Nor does it necessarily follow that in every case in which a carrier blankets its main-line points it must also extend the blanket to include its own branch-line points. The carrier's rights and duties in this respect are limited and controlled by the rights of competing shippers located on branch lines extending from the grouped main-line points to enjoy rates which are properly related to the rates applying from the grouped points taken as a whole, and no hard and fast rule can be laid down which would permit or deny a carrier, regardless of the extent to which the main-line points are grouped, arbitrarily to exclude its branch-line points from the group rate.

We have recognized that a carrier may, within proper limits, protect its own business, and that there may be cases in which a carrier should not be required to give to points on an independent connection the same rates to markets that it gives to points on its own branch lines in the same region. That rule is subject to the qualification that the carrier may not so adjust rates on its own lines as unduly to prejudice shippers on other lines or to deprive such shippers of just and reasonable rates merely through a desire to serve shippers on its own lines. Willamette Valley Lumbermen's Asso. v. S. P. Co., 51 I. C. C. 250, 261.

On the basis of the foregoing analysis I do not think that the complainant is entitled to the junction-point rate on lumber.

Commissioner Esch did not participate in the disposition of this case.

311 Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of April, A. D. 1921.

No. 10827.

Swift Lumber Company

v.

Fernwood & Gulf Railroad Company; James C. Davis, Director General, as Agent; Illinois Central Railroad Company; The Yazoo & Mississippi Valley Railroad Company; New Orleans Great Northern Railroad Company; Gulf, Mobile & Northern Railroad Company; Mobile & Ohio Railroad Company; Southern Railway Company; New Orleans & Northeastern Railroad Company; Alabama Great Southern Railroad Company; The Alabama Northern Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; Alabama & Vicksburg Railway Company; The Atchison, Topeka & Santa Fe Railway Company; Atlantic City

Railroad Company; Ann Arbor Railroad Company; Ashland Coal & Iron Railway Company; Atlantic Coast Line Railroad Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Southwestern Railroad Company; Bessemer & Lake Erie Railway Company; Boston & Albany Railroad Company (The New York Central Railroad Company, lessee); Boston & Maine Railroad and J. H. Hustis, temporary receiver; Buffalo & Susquehanna Railroad Corporation; Buffalo, Rochester & Pittsburgh Railway Company; Central Indiana Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Railway Company; The Chesapeake & Ohio Railway Company; The Chesapeake & Ohio Railway Company of Indiana; The Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railroad Company and Thomas D. Heed, receiver; Chicago & North Western Railway Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Kalamazoo & Saginaw Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Gary Railway Company; Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and Wm. Cotter, receivers; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Chicago, Rock Island & Pacific Railway Company; The Cincinnati, Lebanon & Northern Railway Company; The Cincinnati Northern Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Coal & Coke Railway Company; Cumberland & Pennsylvania Railroad Company; The Cumberland Valley Railroad Company; The Cincinnati, Indianapolis & Western Railroad Company; Chicago, Burlington & Quincy Railroad Company; The Delaware & Hudson Company; The Delaware, Lackawanna & Western Railroad Company; Detroit & Toledo Shore Line Railroad Company; Detroit, Toledo & Ironton Railroad Company; The Duluth, South Shore & At-
312 lantic Railway Company; Detroit & Mackinac Railway Company; Detroit, Bay City & Western Railroad Company; Elgin, Joliet & Eastern Railway Company; Erie Railroad Company; Evansville & Indianapolis Railroad; Fort Dodge, Des Moines & Southern Railroad Company; The Gettysburg & Harrisburg Railway Company; Grand Trunk Western Railway Company; Grand Rapids & Indiana Railway Company; The Great Northern Railway Company; Greenwich & Johnsonville Railway Company; The Hocking Valley Railway Company; Indiana Harbor Belt Railroad Company; The Interstate Railway Company; The Kanawha & Michigan Railway Company; Kewaunee, Green Bay & Western Railroad Company; Kentucky & Indiana Terminal Railroad Company; The Lake Erie & Western Railroad Company; The Lehigh & Hudson River Railway Company; Lehigh & New

England Railroad Company; Lehigh Valley Railroad Company; The Long Island Railroad Company; Little Kanawha Railroad Company; Louisville & Nashville Railroad Company; Louisville, Henderson & St. Louis Railway Company; Litchfield & Madison Railway Company; The Lorain, Ashland & Southern Railroad Company; Maine Central Railroad Company; Maryland, Delaware & Virginia Railway Company; The Michigan Central Railroad Company; Mineral Range Railroad Company; The Minneapolis & St. Louis Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri Pacific Railroad Company; The Monongahela Railway Company; Montpelier & Wells River Railroad; Nashville, Chattanooga & St. Louis Railway; New Jersey & New York Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Philadelphia & Norfolk Railroad Company; New York, Susquehanna & Western Railroad Company; Norfolk Southern Railway Company; Norfolk & Western Railway Company; The Northern Ohio Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; The Pennsylvania Railroad Company, Western Lines; Pere Marquette Railway Company; Philadelphia & Reading Railway Company; The Philadelphia, Newton & New York Railroad Company; The Pittsburgh & Lake Erie Railroad Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; Peoria Railway Terminal Company; Pontiac, Oxford & Northern Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; Rutland Railroad Company; St. Johnsbury & Lake Champlain Railroad Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Schoharie Valley Railway Company; Stony Creek Railroad Company; Susquehanna & New York Railroad Company; Seaboard Air Line Railway Company; Tennessee Central Railroad Company and W. K. McAllister, receiver; The Toledo & Ohio Central Railway Company; Toledo, Peoria & Western Railway Company and E. N. Armstrong, receiver; Toledo, St. Louis & Western Railroad Company and W. L. Ross, receiver; The Ulster & Delaware Railroad Company; The Virginian Railway Company; Wabash Railroad Company; Washington Southern Railway Company; Waterloo, Cedar Falls & Northern Railway Company; Western Maryland Railway Company; West Jersey & Seashore Railroad Company; The Wheeling & Lake Erie Railway Company; The Zanesville & Western Railway Company; Arcade & Attica Railroad Corporation; The Akron, Canton & Youngstown Railway Company; Arcadia & Betsy River Railway Company; Bloomsburg & Sullivan Railroad Company;
Boyne City, Gaylord & Alpena Railroad Company;
313 Cadiz Railroad Company; Central West Virginia & Southern

Railroad Company; Chesapeake Western Railway; Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Cornwall Railroad Company; Coudersport & Port Allegany Railroad Company; Dansville & Mount Morris Railroad Company and A. S. Murray, receiver; The Delaware Valley Railway Company; The East Jordan & Southern Railroad Company; Fonda, Johnstown & Gloversville Railroad Company; Genesee & Wyoming Railroad Company; Grafton & Upton Railroad Company; Ironton Railroad Company; Kalamazoo, Lake Shore & Chicago Railway Company; Louisville & Jeffersonville Bridge & Railroad Company; Manistee & Northeastern Railroad and The Michigan Trust Company, receiver; Marion & Rye Valley Railway Company; Maryland & Pennsylvania Railroad Company; Montour Railroad Company; Mount Jewett, Kinzua & Riterville Railroad Company; Morristown & Erie Railroad Company; New Jersey, Indiana & Illinois Railroad Company; New York & Pennsylvania Railway Company; The Pennsylvania & Atlantic Railroad Company (Union Transportation Company, lessee); The Pittsburgh, Shawmut & Northern Railroad Company and F. S. Smith, receiver; The Pittsburgh, Lisbon & Western Railroad Company; Prattsburg Railway Corporation; Rahway Valley Railroad Company; Rapid Railroad Company; Raritan River Railroad Company; Reynoldsville & Falls Creek Railroad Company; St. Louis & Hannibal Railroad Company; The Tuckerton Railroad Company; Traverse City, Leelanau & Manistique Railroad Company; Unadilla Valley Railway Company; Virginia Southern Railroad Company; The Wabash, Chester & Western Railroad Company and J. Fred Gilster, receiver; Western Allegheny Railroad Company; West Virginia Northern Railroad Company; Wharton & Northern Railroad Company; Williamsport & North Branch Railroad Company and Edw. Bailey, receiver; and The Youngstown & Ohio River Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 5, 1921, and thereafter to abstain, from publishing, demanding, or collecting any rates for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the Ohio River crossings, to destinations in Wisconsin, Minnesota, Iowa, and Missouri, to destinations in central and eastern trunk line territories, and to destinations in Tennessee and Kentucky, the rates to which

are blanketed from yellow-pine producing points on the Illinois Central and New Orleans Great Northern Railroads south of Jackson, Miss., in excess of the rates contemporaneously published, demanded, or collected by them for the transportation of yellow-pine
314 lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

It is further ordered, that said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 5, 1921, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the destinations described in the next preceding paragraph, rates not in excess of the rates contemporaneously maintained and applied by them to the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

And it is further ordered, that this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

449 *Order setting cause for hearing.*

Filed Aug. 12, 1921.

In the District Court of the United States, Southern District of Mississippi, ———Division.

[Title omitted.]

The undersigned, judge of the United States District Court in and for the Eastern District of Louisiana, having been duly and properly designated by the senior United States circuit judge in and for the Seventh Circuit to act for and in the place of the district judge in and for the Southern District of Mississippi, who is now absent from the district and from the State of Mississippi, having been advised that a bill in the above styled cause has been filed in the District Court of the United States for the Southern District of Mississippi, wherein there is sought to have canceled, annulled and set aside an order of the Interstate Commerce Commission and wherein an injunction is sought to restrain the enforcement of an order of the Interstate Commerce Commission, hereby calls to his assistance to hear and to determine the application of the plaintiffs for the said injunction, the honorable R. W. Walker, circuit judge, and the honorable W. I. Grubb, district judge, for the purpose of hearing said application, and the undersigned district judge hereby fixes Birmingham,

Ala., as the place, and the 18th day of August, nineteen twenty-one, at ten o'clock a. m. as the time for hearing said application.

It is further ordered that a copy of this order be forwarded to each of the said judges so designated, and that the clerk of the District Court in and for the Southern District of Mississippi forward by mail notice of the fact, time, and place of the said hearing to the secretary of the Interstate Commerce Commission, Washington, D. C., and to the Attorney General of the United States, Washington, D. C., as required by statute, which notice shall be accompanied by a copy of this order.

Witness my hand this 11th day of August, 1921.

RUFUS E. FOSTER,
Judge.

[File endorsement omitted.]

450 *Motion for preliminary injunction.*

Filed Aug. 11, 1921.

In the District Court of the United States for the Jackson Division of the Southern District of the State of Mississippi.

[Title omitted.]

Now comes the Illinois Central Railroad Company and Fernwood, Columbia & Gulf Railroad Company and moves the court to grant a preliminary injunction to them upon the bill heretofore filed upon the 4th day of August, 1921, wherein the United States was a party defendant, there having been heretofore given to the Interstate Commerce Commission and to the United States Attorney General due notice of the time and place of the hearing of this application, and petitioners respectfully represent that irreparable damages would ensue in this, viz: They would be compelled to publish tariffs, fundamentally altering their entire rate structure, which, when published, would be without any effect in this, said commission is, as petitioners are advised, without authority to make said publication effective.

Second. In this, that if the arbitrary condemned as unjustly discriminatory were removed, it would be impossible to collect the same from those shipments made while the unlawful rates were in effect, and the amount of such arbitrary would be entirely lost to the carriers in this, that the cost of collection from the shippers, if it could be collected, would be in excess almost of the amount collected, and that who would be responsible for the freight is a matter which would be difficult, if not impossible, to accurately ascertain, and thereby the amount of such freight to which petitioners were lawfully entitled under their lawful tariffs would be diverted and destroyed and given to persons who would not be entitled to have and receive the same.

451 That in support of this motion affidavits and oral testimony will be introduced.

[File endorsement omitted.]

454 *Motion for order setting time and place for hearing on preliminary injunction.*

In the District Court of the United States for the Jackson Division of the Southern District of the State of Mississippi.

[Title omitted.]

To the Hon. Rufus E. Foster, District Judge in and for the State of Louisiana:

Comes the Illinois Central Railroad Company, a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Illinois, with its residence and legal domicile therein, hereinafter called "Central Company," and the Fernwood, Columbia & Gulf Railroad Company, a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Mississippi, having its legal domicile therein, hereinafter called "Fernwood Company" (and both said Central Company and said Fernwood Company, hereinafter called "Carriers") respectfully represent that the Hon. Edwin R. Holmes is the sole United States district judge residing in the State of Mississippi, and that there is no other Federal judge to be found therein. Upon August 4th, 1921, in the above-entitled cause, in the above-entitled court, there was filed against the United States a petition to set aside, annul, and suspend an order of the Interstate Commerce Commission, made and entered originally upon April 5th, 1921, and the several orders suspending the effective dates thereof until September 5th, 1921, in that certain cause lately pending, brought by the Swift Lumber Company, sole complainant, against the carriers and divers other carriers, and numbered upon the docket of said commission 10827, and that said District Court of the United States in and for the Jackson Division of the Southern District of Mississippi is the court having jurisdiction thereover, and that the pleas and proceedings had before said
455 commission are annexed as an exhibit to the original bill filed and made a part thereof as fully as if therein copied.

The said order so made by said Interstate Commerce Commission was entered by a divided commission; five members thereof reversed the examiner and disregarded his report as a matter of law, concurring with him in his findings of fact, three members were for confirming the report and dismissing the petition, and three members of said commission did not participate in the decision; all members of the division who heard the oral argument to the commission, there being two left at the date of the decision, were in favor of dismissing the petition.

That said order so made by said commission fundamentally alters the complete rate structure in the southeastern portion of the State

of Mississippi, and integrates a principle of rate making therein radically varying from that which had obtained for twenty-five years by compelling the independent short line carriers to name the same rate from their local stations as obtained from stations upon the trunk lines, and that such alteration will result in a fundamental decrease in a large amount of the revenue of the carriers. That said order became effective September 5th but fifteen days prior thereto it is essential that said rates should be published, and so to do involves considerable labor and expense, but must be done unless suspended by this honorable court by the granting of appropriate temporary injunction.

Unless enjoined and restrained for the reasons set forth in the original bill, irreparable damage will accrue to the carriers wherefor they have no means of redress saving the issuance of an injunction by this court due to the absence of said Federal judges from the State of Mississippi.

Unless enjoined before the 20th day of August, 1921, the cost
456 of preparation and publication of said tariffs containing said illegal rates will have to be made, and the time and money therein spent will be irretrievably lost, contrary to the very rights of the parties.

Carriers therefore ask that in pursuance of the statutes in that behalf made and provided, that your honor will name forthwith a time when and a place where the annexed application for a preliminary injunction in accordance with the prayer of said bill may be heard so that notice, as by law required, may be thereof given to the parties thereunto entitled, and that at said time and said place your honor will call the two other judges required by statute so that at said time and place so thus to be fixed due notice may be given to the honorable the Attorney General of the United States, and to the Interstate Commerce Commission, and such other persons as may be thereunto lawfully entitled, and that at such time and place a preliminary injunction may issue upon the bill filed under the application therefor filed in this cause.

That your honor has been designated as a proper judge to act in the premises by order duly made by the Honorable R. W. Walker, senior circuit judge for the Fifth Circuit.

Wherefore, as the issues involved are of the gravest import, especially to the Fernwood Company, the carriers pray that an order be made fixing said time and said place whereat said preliminary injunction may be applied for, and as in duty bound.

R. V. FLETCHER,
Atty. for I. C. R. R.
GREEN & GREEN,
Atty. for F., C. & G. Ry.

457 *Motion for preliminary injunction.*

Filed Aug. 11, 1921.

In the District Court of the United States for the Jackson Division of the Southern District of the State of Mississippi.

[Title omitted.]

Now comes the Illinois Central Railroad Company and Fernwood, Columbia & Gulf Railroad Company and moves the court to grant a preliminary injunction to them upon the bill heretofore filed upon the 4th day of August, 1921, wherein the United States was a party defendant, there having been heretofore given to the Interstate Commerce Commission and to the United States Attorney General due notice of the time and place of the hearing of this application, and petitioners respectfully represent that irreparable damages would ensue in this, viz: They would be compelled to publish tariffs, fundamentally altering their entire rate structure, which, when published, would be without any effect in this that said commission is, as petitioners are advised, without authority to make said publication effective.

Second. In this, that if the arbitrary condemned as unjustly discriminatory were removed, it would be impossible to collect the same from those shipments made while the unlawful rates were in effect, and the amount of such arbitrary would be entirely lost to the carriers in this, that the cost of collection from the shippers, if it could be collected, would be in excess almost of the amount collected and that who would be responsible for the freight is a matter which would be difficult, if not impossible, to accurately ascertain, and thereby the amount of such freight to which petitioners were lawfully entitled under their lawful tariffs would be diverted and destroyed and given to persons who would not be entitled to have and receive the same.

458 That in support of this motion affidavits and oral testimony will be introduced.

459

[File endorsement omitted.]

461 *Notice of hearing of application for preliminary injunction.*

Filed Aug. 11, 1921.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

[Title omitted.]

To the Secretary of the Interstate Commerce Commission, Washington, D. C.:

To the Attorney General of the United States, Washington, D. C.:

You will hereby take notice that in pursuance of an order, dated August 11th, 1921, rendered by Hon. Rufus E. Foster, district judge of the United States for the State of Louisiana, said judge having been duly and properly designated by the senior United States circuit judge in and for the Seventh Circuit to act for and in the place of the district judge in and for the Southern District of Mississippi, there will be heard in the above-styled cause, before the judges designated in the said order, a copy of which order is hereby attached to this notice, an application for a preliminary injunction on the 18th of August, 1921, in the city of Birmingham, Alabama.

Dated this 11th day of August, 1921.

R. V. FLETCHER,
Atty. for I. C. R. R.
GREEN & GREEN,
Attys. for F. C. & G. R. R.

[File indorsement omitted.]

468 *Motion of the United States to dismiss the bill of complaint.*

Filed Aug. 18, 1921.

In the United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

United States of America, defendant, by its counsel, now comes and moves the court to dismiss the bill of complaint in the above-entitled cause at the cost of the plaintiffs.

As grounds for this motion it is shown:

1. The bill of complaint and the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the defendant and the court may not grant the relief prayed or any part of the same.

2. The alleged contract may not stand if found to contravene the provisions of the statute.

3. Blanket rates for zones and exceptions thereto as to either rates or areas are all matters within the exclusive jurisdiction of the commission whose finding of fact is final.

469 4. The views expressed by the dissenting members of the commission are foreclosed by the findings in the main report.

5. The report of the Interstate Commerce Commission and order entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced on the

issues made by the parties, and the matters and things alleged in the bill of complaint and sought to be put in issue are foreclosed by the findings of fact.

6. It appears from the bill of complaint and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the acts to regulate commerce, and the transportation act, 1920, and that it was regularly made and entered by the commission in a proceeding properly pending and conducted,

7. The plaintiffs have not in and by the bill of complaint shown that in making the order the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the plaintiffs protected by the Constitution of the United States or any other right of the plaintiffs over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the bill of complaint, more fully to be pointed out on the
470 hearing hereof, defendant prays that its motion be sustained, and for such other and further action as may be appropriate.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JULIAN P. ALEXANDER,
United States Attorney, Southern District of Mississippi.

[File endorsement omitted.]

473 *Answer of the Interstate Commerce Commission.*

Filed Aug. 18, 1921.

In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

[Title omitted.]

The Interstate Commerce Commission, intervening defendant in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering paragraphs I to XXV, inclusive, of the bill of complaint, this defendant, which for convenience will be referred to hereinafter as the commission, admits that a complaint was filed with the commission by the Swift Lumber Company on July 2, 1919, and was docketed as No. 10827, as alleged in the bill of com-

plaint; that answers to said complaint were filed with the commission by various defendants named therein; that the case was duly heard; that briefs were filed on behalf of the parties; that a proposed report was made by the examiner who conducted the
474 hearing; that exceptions to said proposed report were filed by the Swift Lumber Company and the Fernwood & Gulf Railroad Company; that the case was argued before certain commissioners; that the commission made a report and order in the premises on April 5, 1921, reported in 61 I. C. C. 485; that defendants filed petitions for rehearing and reargument; and that said petitions were denied by the commission. For definite information concerning the contents of said complaint, answers, and other documents mentioned above, the commission respectfully refers the court to those documents.

The commission further alleges that copies of said documents filed in said docket No. 10827, referred to in the bill of complaint, were not attached to the copy of the bill of complaint herein served upon the commission, and therefore the commission neither admits nor denies that copies of said documents are attached to the bill of complaint filed in this suit and marked as exhibits and made a part thereof.

The commission denies that on the date of its said report and order in docket No. 10827, namely, April 5, 1921, it was composed of eleven members, and alleges that on the date mentioned it was composed of nine members.

The commission further alleges that by order dated June 24, 1921, the effective date of the order of April 5, 1921, was made September 5, 1921, instead of August 5, 1921; and that by order dated July 29, 1921, defendants were given permission to establish rates in compliance with the order of April 5, 1921, upon not less than 15 days' notice instead of upon not less than 30 days' notice.

The commission further alleges that the findings made in said report and order of April 5, 1921, as modified on June 24, 1921, and July 29, 1921, were, and are, and that each of them was, and is, fully supported and justified by the record before the commission in that proceeding.

The commission further alleges that in making said report, findings, and orders it considered and weighed carefully, in the
475 light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by allegations in the petition in this suit.

The commission further alleges that said report, findings, and orders were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making them it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and that the commission denies each of, and all, the allegations to the contrary contained in said petition.

II.

Except as herein expressly admitted, the commission denies the truth of each of, and all, the allegations contained in the petition herein in so far as they conflict either with allegations in this answer or with either the statements or conclusions of fact included in the commission's said report and orders, which are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to aver, maintain, and prove, as this honorable court shall direct, and therefore prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
J. CARTER FORT,
By WALTER MCFARLAND, *Counsel.*

P. J. FARRELL,
Of Counsel.

476 CITY OF WASHINGTON,
District of Columbia, ss:

Joseph B. Eastman, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named intervening defendant, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

JOSEPH B. EASTMAN.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 16th day of August, 1921.

[SEAL.] ALFRED HOLMEAD,
Notary Public.

[File endorsement omitted.]

477 *Motion of Swift Lumber Company, Intervenor, to dismiss the bill of complaint.*

In the United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

Filed Aug. 18, 1921.

Now comes the Swift Lumber Company, a corporation organized under the laws of Mississippi, and having its principal place of business at Knoxo, in that State, and shows that it is the complainant in cause No. 10826 on the docket of the Interstate Commerce Commission, in whose favor the order of the commission complained of the bill of complaint herein was entered. Said Swift Lumber Company prays leave to intervene herein for the purpose of filing this motion, and for filing such answer to said bill of complaint or other plead-

ings as may hereafter be appropriate; and for cause of this present motion to dismiss said bill of complaint, says:

1. Intervenor shows that under the order of the Interstate Commerce Commission herein attacked it is entitled to have made effective September 5, 1921, rates on lumber shipped by it from Knoxo, Miss., not higher than those contemporaneously in effect from Fernwood, Tylertown, and Foxworth, Miss.; and the suspension of said order of the commission during the pendency of this action, as prayed for in the concluding portion of said bill of complaint, will deprive it of such rates, and subject it to a burden and damages which are unjust, for which it must await relief until the final determination of this case, even if it can be fully compensated therefor. Wherefore, intervenor prays that the temporary restraining order so prayed for by plaintiffs be denied, and dismissed.

2. In other respects, intervenor adopts for its own the motion to dismiss the complaint, filed herein by the United States, and the grounds therefor, and prays that the same be considered in all respects as if made by intervenor.

SWIFT LUMBER COMPANY,
Intervenor.
By L. PALMER, *Its Attorney.*

[File endorsement omitted.]

478 *Order granting preliminary injunction.*

Filed Aug. 19, 1921.

United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

This day this cause came on to be heard and was argued by counsel; and thereupon, after consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That a preliminary injunction be, and the same is hereby, issued out of this court in accordance with the prayer of the bill of complaint against the order of the Interstate Commerce Commission of April 5, 1921, referred to in the bill of complaint, and that the said order be, and the same is hereby, suspended and enjoined until the further order of the court.

2. That the plaintiffs shall give bond in the penal sum of twenty-five thousand ($25,000) dollars, to be approved by the clerk of this court, conditioned that the plaintiffs will prosecute the above-entitled cause with all convenient diligence, and will indemnify and save harmless the United States, Interstate Commerce Com-
479 mission, Swift Lumber Company, and any and all persons whomsoever who may be interested therein or affected thereby for any loss, costs, or damages which they, or any of them, may sustain by reason of the issuance of the preliminary injunction in the event the order granting the preliminary injunction should be

reversed and the order of the Interstate Commerce Commission, hereinbefore referred to, should be sustained. Jurisdiction of causes of actions for recovery of damages on this bond shall by its terms be vested in this court.

3. That the plaintiffs, and each of them, shall make and keep true and accurate accounts of any and all shipments moving over the lines of the plaintiffs from and after the date hereof, and the amounts charged and paid to them and each of them, on the basis of the rates now in force and effect which would have been reduced or affected by the order of the Interstate Commerce Commission had the same not hereby been suspended and enjoined.

By the court:

R. W. WALKER,
United States Circuit Judge.
RUFUS E. FOSTER,
W. I. GRUBB,
United States District Judges.

480

[File endorsement omitted.]

482 *Bond on preliminary injunction.*

Filed Aug. 19, 1921.

In the United States District Court of the Jackson Division of the Southern District of the State of Mississippi.

[Title omitted.]

Whereas, upon the 18th day of August, 1921, a temporary injunction was granted in the above-entitled cause by the Honorable R. W. Walker, United State circuit judge, Rufus E. Foster and William I. Grubb, United States district judges, upon complainants therein entering into bond in the sum of twenty-five thousand dollars (25,000.00) as therein prescribed.

Now, know all men by these presents, that we, the Illinois Central Railroad, a corporation, and the Fernwood, Columbia & Gulf Railroad Company, a corporation, our successors and assigns as principals, and Yazoo & Mississippi Valley R. R. Co., as surety, are held and firmly bound unto the United States of America, the Interstate Commerce Commission, the Swift Lumber Company, and all other persons mentioned in said order, granting said injunction in the penal sum of twenty-five thousand dollars ($25,000.00), for the payment of which, well and truly to be made, we bind ourselves firmly by these presents.

Executed this 19th day of August, 1921, but this bond is upon condition, viz, that the above bounden principals will well and truly prosecute the above-entitled cause with all convenience and diligence and will indemnify and save harmless the United States, the Interstate Commerce Commission, Swift Lumber Company, and

any and all persons whomsoever may be interested therein or affected thereby for any loss, cost, or damages which they or any of them may sustain by reason of said preliminary injunction in
483 the event the order granting the preliminary injunction should be reversed and the order of the Interstate Commerce Commission made upon the 5th day of April, 1921, in the case of Swift Lumber Company v. The Fernwood, Columbia & Gulf Railroad Company, numbered 10827, on the docket of said Interstate Commerce Commission, should be sustained, and will make and keep true and accurate account of any and all shipments moving over the lines of the plaintiffs from and after the date hereof, and the amounts charged and paid to them and each of them on the basis of the rates now in force and effect which would have been reduced or effected by the order of the Interstate Commerce Commission aforesaid had the same not been suspended and enjoined, and if said above bounden principals shall well and truly do and perfrom each and every of the foregoing conditions this bond shall be void, otherwise to remain in full force and effect. Jurisdiction of causes of action for recovery of damages in this bond shall be vested in this court alone.

ILLINOIS CENTRAL RAILROAD COMPANY,
By JAS. SANDERS, *Atty. in Fact.*
FERNWOOD, COLUMBIA & GULF RAILROAD COMPANY,
By GREEN & GREEN, *Attys. of Record in Fact.*
YAZOO & MISS. VALLEY RAILROAD CO., *Surety,*
By JAS. SANDERS, *Atty. in Fact.*

I, the undersigned clerk of the District Court of the United States for the Jackson Division of the Southern District of Mississippi, approve the foregoing bond by the power in me vested by the decree in this cause made this the 19th day of August, 1921.

JACK THOMPSON, *Clerk.*

484

[File endorsement omitted.]

486 *Writ of injunction.*

Filed Aug. 19, 1921.

THE UNITED STATES OF AMERICA,
Southern District of Mississippi;
The President of the United States of America, to all to whom these presents may come, greeting:

Whereas there has been filed in the said court a bill of complaint by the Illinois Central Railroad Company et al. against the United States of America, wherein the Interstate Commerce Commission and Swift Lumber Company intervened as defendants, and

Whereas under pleas and proceedings duly had a temporary injunction was granted in accordance with prayer of said bill upon

the giving of a bond as required by said decree in the penal sum of twenty-five thousand dollars, which has been duly given and approved,

Now this writ of injunction is to command you, the said United States of America, the Interstate Commerce Commission, the Swift Lumber Company, your agents, attorneys, and employes, that you forthwith cease and desist from enforcing or seeking to enforce that certain order made by the Interstate Commerce Commission in that certain cause lately before it pending styled Swift Lumber Company v. Fernwood, Columbia and Gulf Railroad Company et al., numbered on its docket 10827, wherein the final order herein enjoined was made upon April 5th, 1921, and that you and each of you forthwith cease and desist from attempting to give to said order of said commission any force or effect until the further order of this court.

Witness the Honorable R. W. Walker, United States circuit judge, Rufus E. Foster, and W. I. Grubb, United States district judges, on this the 19th day of August, A. D. 1921.

[SEAL.]

JACK THOMPSON,
Clerk, U. S. District Court,
So. District of Miss.

[File endorsement omitted.]

487 *Answer of Swift Lumber Company to bill of complaint.*

Filed Nov. 16, 1921.

In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

[Title omitted.]

To the honorable the District Court of the United States for the Southern District of Mississippi, Jackson Division:

Now comes the Swift Lumber Company, having heretofore intervened in the above-entitled cause by motion to dismiss the bill of complaint filed by the plaintiffs herein; and said motion having been overruled and said complaint assigned for trial upon its merits, prays leave of the court to file this its answer as such intervening defendant to said bill of complaint; and for such answer to the matters and things alleged in the various paragraphs of said bill of complaint says:

I.

In answer to paragraph 1 of said bill, this intervenor says that it is the Swift Lumber Company referred to in said paragraph as the complainant in case No. 10827 on the docket of the Interstate Commerce Commission. It admits that the allegations of said paragraph are true, except so far as the concluding portion thereof may be susceptible to the possible interpretation that this intervenor, in its said

complaint to the Interstate Commerce Commission (hereinafter called the commission) charged a violation of sections 1, 2, and 3 of the interstate commerce act against said Fernwood & Gulf
488 Railroad Company (designated in said bill, and hereinafter, the Fernwood Company) alone; the fact being that such complaint of intervenor charged a violation of said sections against all the defendants named therein by reason of the maintenance and assessment of the various rates mentioned therein on lumber from Knoxo, Miss., to interstate points. Also except that the supplemental complaint of intervenor therein referred to was not in fact filed with the commission as such.

II.

Intervenor admits that plaintiffs herein filed answers to its complaint before the commission substantially as alleged in paragraph II of the bill of complaint.

III.

Intervenor admits that the further matters of defense alleged in paragraph III of the bill of complaint were set up by defendants in their said answers.

IV.

Intervenor admits that a hearing was had on its said complaint as alleged in paragraph IV of the bill of complaint, but it denies that the testimony adduced on such hearing showed the facts therein claimed, except the specific facts set out in the subdivision of said paragraph numbered 2. Intervenor says that on the contrary it fully sustained the burden of proof imposed upon it, and established by proper evidence that the rates complained of were unreasonable (although such contention was not upheld by the commission), and also showed, as was held by the commission, that such rates were discriminatory, and operated to the undue prejudice and disadvantage of intervenor and said station of Knoxo, Miss., and to the undue advantage and favor of other shippers of like commodities and other stations and points of *of* origin thereof; and the finding by the commission of undue prejudice and disadvantage was amply sustained by evidence adduced and exhibits filed in the record of said cause before the commission.

V.

Intervenor admits the allegations of paragraph V of the bill of complaint.

VI.

Intervenor admits the allegations of paragraph VI of said bill of complaint.

489

VII.

Intervenor admits the allegations of paragraph VII of said bill of complaint, with the explanation that the supposed supplemental complaint therein referred to was not filed with the commission as such, but was utilized as an exhibit at the hearing before the commission's examiner.

VIII.

Intervenor admits the allegations of paragraph VIII of said bill of complaint.

IX.

Intervenor has no sufficient knowledge of the matters set up in paragraph IX of the bill of complaint to either admit or deny the same, save as to those in the first subdivision thereof, which it admits, and the findings which it is alleged the commission would have made, which it denies. Intervenor points out, however, that it appears from said allegations that the findings of the commission herein complained of were duly and lawfully made by a majority of the commission then constituted, and is therefore not subject to review by this court for the reasons assigned in said paragraph. In addition thereto, intervenor shows that the merits of the case were in fact passed upon subsequently by a full commission of eleven members, by the overruling of plaintiff's motions for reargument and rehearing.

X.

Intervenor denies all the allegations of paragraph X of the bill of complaint, except as follows: It admits that intervenor, prior to the erection of its sawmill at Knoxo, Miss., entered into a written contract with the Fernwood Lumber Company, the predecessor in ownership of the line of railway now owned and operated by the Fernwood Company, complainant herein, by which it received from said Fernwood Lumber Company certain rights of way for its logging railroad over the lands of the latter company, from intervenor's timber to its mill site at Knoxo, subject to certain mutual rights and obligations specified in said contract as to the construction and operation of said logging railroad. It says that having been led to select Knoxo for the location of its sawmill for reasons not material to this case, it procured said right of way from said Fernwod Lumber Company, which was moved to grant the same by the desire to secure the location of intervenor's sawmill on its road as a source of revenue to itself. The clause in said contract by which intervenor agreed to ship all its product over said line of railroad

490 was in effect only a statement of the actual consideration moving said Fernwood Lumber Company to grant such right of way, but in actual effect was superfluous, for the reason that intervenor, having erected its sawmill at Knoxo, had no other

means of making its shipments; for which reason it has necessarily complied strictly with that portion of its said contract.

Intervenor further says that said contract was entirely silent as to the rates which intervenor should pay on its said shipments, and did not purport to obligate intervenor to pay the then existing rates or rates on any basis. That apart from the fact that such a contract as claimed by said Fernwood Company would have been contrary to public policy, and therefore void, the terms of said contract do not justify such construction by any reasonable interpretation; and even assuming such an interpretation, it has been violated by said Fernwood Company by several successive advances in the rates existing at the time said contract was entered into.

XI.

In answer to the first three subdivisions of paragraph XI of the bill of complaint, intervenor says the same are in effect answered by paragraph X hereof, and denies that it was or is estopped to prosecute its said complaint before the commission; and it further says that it could not in law be estopped by any contract to complain of discriminatory rates.

It admits the allegations of the fourth and fifth subdivisions of said paragraph, including the quotation of the commission's order denying the petitions for rehearing and reargument therein described. It also admits that with the exception mentioned in the sixth subdivision (numbered 9) of said paragraph, the commission found that the rates complained of by intervenor had not been shown to be unreasonable in and of themselves.

Intervenor has no knowledge sufficient to admit or deny the allegations contained in the seventh (numbered 10) and eighth subdivisions of said paragraph XI of the bill of complaint. It says, however, that even if the circumstances and conditions surrounding the operation of the railroad of the Fernwood Company be as herein stated, the effect to be given to them in passing upon the complaint of intervenor before the commission was properly within the discretion of the commission, which has determined them adversely to the contention of said Fernwood Company. Intervenor further says that although such matters were in effect assigned as matters of defense by said Fernwood Company in its answer filed with the commission to intervenor's complaint, as alleged in
91 paragraph II of its bill of complaint herein, it adduced no evidence to adequately support such contention; nor does it allege in the bill of complaint herein the necessary facts and conditions to indicate that the findings and order of the commission preclude it from securing from the operation of its railroad the revenue to which it claims to be entitled. Intervenor says that, as alleged in paragraph X of the bill of complaint, said Fernwood Company's line of railroad was originally built and owned by the Fernwood

Lumber Company for the primary purpose of transporting its logs from the timber along said road to its mill at Fernwood, Miss., and was afterwards sold to the Fernwood Company, whose ownership of stock was and is practically the same as that of the Fernwood Lumber Company. Intervenor says that if it be true that said railroad was built solely for said purpose of hauling timber and timber products, whether the property of said Fernwood Lumber Company or of others, such purpose was logically and necessarily more essentially exclusive while said railroad was owned and operated by said Fernwood Lumber Company; and such operation should have been charged with a capital retirement reserve which should have been reflected in the price at which the road was sold to the Fernwood Company. Said Fernwood Company, however, at the hearing of said complaint, and throughout the whole proceedings before the commission, entirely failed to show that its original investment in the purchase of said railroad from the Fernwood Lumber Company was a reasonable one, allowing a proper retirement reserve on its cost during its operation by said lumber company. It also appeared that the great bulk of its traffic consisted of logs hauled for said Fernwood Lumber Company, and it failed to show what revenue it received on such traffic, or the reasonableness of the rates charged therefor, either in and of themselves or relatively to the charges assessed against intervenor. Intervenor therefore says that whatever may be the merits of the contentions of the Fernwood Company in said portion of its bill of complaint, or their justification of the discriminatory rates charged intervenor, it entirely failed to sustain the same by proof before the commission, and therefore is precluded from urging the same before this court.

XII.

In answer to paragraph XII of said bill of complaint, intervenor says that it has no knowledge sufficient to admit or deny the allegations contained in the first subdivision thereof. As to the second subdivision thereof, it says that the order of the commission in question does not in any manner interfere with or disturb said
492 Fernwood Company in the exercise of any proper individual policies, but is merely an exercise of the powers vested in the commission by law to require the establishment of proper, reasonable, and nondiscriminatory rates, which regulatory power extends to the condemnation of individual policies. That the Fernwood Company's policy of plussing rates from its local points, especially lumber rates, is one specially calculated to invite scrutiny, in view of the fact that it involves placing industries on it own line at a disadvantage as compared with those on other roads adjacent to it, and the further fact that the proprietary interests of said Fernwood Company are largely if not entirely identical with those of the Fernwood Lumber Company, with which sawmills at its local

points compete. The control by the commission of the individual policies of the Fernwood Company by its order was within the proper and reasonable exercise of its power, so far as such control was involved in passing upon the rates assessed against the shipments of intervenor, not by the Fernwood Company alone, but by all the other defendants complained of before the commission.

XIII.

Answering paragraph XIII of said bill of complaint, intervenor admits that the lumber rate situation on independently operated short lines in the territory therein described is as therein stated, but intervenor has no knowledge as to how such situation was established. It denies that said alleged individualization of lumber rates by said carriers was in any manner beyond the control of the commission; and further points out that, as shown by the record before the commission, accompanying the bill of complaint herein, the issue before the commission involved the lumber rate adjustment in a much larger territory of origin than that described in said paragraph, in which dissimilar conditions obtained; and from such record it appeared that as a result of the acts of the various defendants in said case, whether dictated by their individual policies or arising from joint action among them, intervenor had been subjected to the imposition of unduly discriminatory and prejudical rates, as was held by the commission.

XIV.

Answering paragraph XIV of said bill of complaint, intervenor says that the record before the commission does not justfy the assumption that it is seeking to eliminate as a general policy the plussing of junction point rates by independent owned and operated short line carriers, although the commission has full power to
493 do so where necessary to correct unreasonable, discriminatory or preferential rates. Intervenor does not attempt to say whether or not the making of rates on combinations of locals or on arbitraries over the junction point rates on shipments from the several short line roads mentioned in said paragraph is proper under the circumstances surrounding them, or whether the individual acts of said carriers in relation thereto constitute a proper and lawful exercise of their discretion; but it says that in the instant case of rates from Knoxo the record amply shows that in the light of the surrounding circumstances such plussing of the junction point rates resulted in undue discrimination and prejudice against intervenor, and fully sustains the findings of the commission to that effect, made in the proper exercise of its discretionary power.

Intervenor denies that the effect of the said order of the commission will be to deprive complainants of the revenue to which they are entitled under the transportation act, and says that the commission, having granted to the complainants and all other carriers

the advances in rates found by it to be necessary to meet the requirements of said act, is not precluded from correcting such unreasonable and discriminatory rates as it may find to exist, especially where, as in the instant case, such discrimination is aggravated by the advances made in accordance with said act. Intervenor also denies that by virtue of the location of its business it is subject to any place disadvantage, and that any such disadvantage was reflected in the price it paid for its stumpage. It says that, on the contrary, in view of the geographical location of its mill it occupies a position of place advantage; and the theory that it is at a place disadvantage rests solely upon the higher rates upon its products, and hence can form no justification for such rates.

XV.

Answering paragraph XV of said bill of complaint, intervenor says that the decision of the commission complained of is not, as is in effect argued therein, solely an attack upon the individual policies of complainants in the making of their rates. Such individual policies are but one factor in the making of the rates in question, which as a whole are the result of the combined action of all the defendants before the commission; and the displacing of the individual policies of complainants is but an incident to the order of the commission, made in the light of many other circumstances and conditions developed in the record before it, and fully justifying such order.

494

XVI.

Intervenor refers to paragraph XV above as a sufficient answer to paragraph XVI of the bill of complaint.

XVII.

Intervenor denies all and singular the allegations of paragraph XVII of the bill of complaint.

XVIII.

Omitted in order to make the paragraphs of this answer conform in numbering to those of the bill of complaint.

XIX.

Intervenor says, in answer to paragraph XIX of the bill of complaint, that the evidence offered before the commission showed that the rates complained of by it discriminated against intervenor and against said station of Knoxo, and subjected them to undue prejudice and disadvantage. It denies that the decision of the commission was based solely, or even primarily, upon the fact that the Central Company extended the junction point rates to points on

the Mississippi Central Railroad, and participated in through rates on lumber from points on the Alabama & Mississippi, the Mississippi & Western, the Cybur, Gulf & Northern, and the Pearl River Valley Railroads, and points out that the issue found and decided by the commission was thus stated by it:

"The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent, may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines."

As will be seen, the controlling fundamental condition thus referred to is the maintenance of uniform or blanket rates from a wide territory of origin, shown by the record to extend for a distance of about 200 miles north and south by the same distance east and west, Knoxo being located approximately in its center. The record therefore showed discrimination against intervenor in the following respects:

1. The blanket rate ignored differences in the length of haul, and the consequent cost of service, to the extent of 200 miles (and for more than that distance on the line of the Central Company);
495 whereas an arbritrary first of 2 cents and later of 2.5 cents per 100 pounds was added for the 27-mile haul from Knoxo to Fernwood, and the 7-mile haul from Knoxo to Tylertown.

2. The blanket rates apply from branch line points on the Illinois Central-Yazoo & Mississippi Valley system, and on the Tylertown and Covington branches of the New Orleans Great Northern, the other direct connection of the Fernwood Company, involving the same interruption in the continuity of the service by transfer from the branch to the main line as involved at Fernwood and Tylertown on shipments from Knoxo.

3. The Central Company and its subsidiary, the Yazoo & Mississippi Valley, applied the blanket rates from connecting originating carriers, i. e., the Louisiana Railway & Navigation Company, the New Orleans Great Northern, the Gulf & Ship Island and the Mississippi Central, while refusing to extend such rates to points on the Fernwood & Gulf. In this connection, intervenor points out that the term "short line" means nothing, the material point being the originating of the traffic by a prior line; and if a difference be made because of the size of such line it is indefensible discrimination per se.

4. Participation by the Central Company at junctions within producing territory in blanket rates from "short line" points through the intervention of other carriers, e. g., from points on the Alabama & Mississippi and the Mississippi & Western, via the Gulf, Mobile & Northern and Ackerman, Miss.

Intervenor shows that the departure by the Central Company from its original policy of confining the group rates to points on its

own rails has thus become so broad as to make its refusal to extend such group rates to Knoxo an act of discrimination, not to be justified even by competition. It further shows that complainants herein are estopped from setting up competition as a defense of such discrimination, for the reason that they have ignored competition at Knoxo. The Fernwood Company, as shown by the record, had two, and now has three, outlets, one via Fernwood and the Central Company; one via Tylertown (now also via Foxworth) and the New Orleans Great Northern; and since the institution of intervenor's complaint before the commission, one via Columbia and the Gulf & Ship Island; the two latter via their connections other than the Central Company, all of whom were parties defendant before the commission. Knoxo is therefore fundamentally as competitively situated as points on the Mississippi Central,
496 yet is not, like the latter, accorded the group basis of rates; while the resulting discrimination is aggravated by the fact that each of the direct connections of the Fernwood Company, together with its connections beyond, and the Fernwood Company itself, recognize the competition at its junctions, each of such connections joining with the Fernwood Company in protecting the group rates from its junctions with the others.

XX.

Intervenor denies the allegations in paragraph XX of the bill of complaint. It says specifically that the similarity of the findings of the commission in the instant case complained of and the McGowan-Foshee case referred to in said paragraph is nothing more a consistency of action by the commission in drawing similar conclusions from similar facts; and the rights of complainants have been fully recognized in the decision complained of. It further says that the decision of the commission clearly shows that it found the rates from Knoxo discriminatory as compared with the uniform rates maintained from the blanket territory described, including Tylertown and Fernwood, and its order properly provided a definiteness in the test of the proper rates to apply from Knoxo by referring to the rates maintained from those two stations.

XXI.

Intervenor denies all and singular the matters and things alleged in paragraphs XXI, XXII, XXIII, XXIV, and XXV of said bill of complaint, all of which allegations are refuted by the record in said case before the commission.

Wherefore intervenor prays that the bill of complaint herein be dismissed.

L. PALMER,
Attorney for Swift Lumber Company, Intervenor.

497

[File indorsement omitted.]

499 *Motion to assign cause for final hearing.*

Filed Aug. 29, 1921.

United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

Honorable Richard W. Walker, United States circuit judge, Honorable Rufus E. Foster and Honorable Walter I. Grubb, United States district judges, holding the United States District Court in pursuance of urgent deficiencies act approved October 22, 1913 (39 Stat. 219, 220).

United States of America and Interstate Commerce Commission now come, by their respective counsel, and move the court, in accordance with the statute in such case made and provided (38 Stat. 219, 220), to assign the above-entitled cause for final hearing at the earliest practicable day, to give precedence to the hearing, and in every way to expedite the same.

JULIAN P. ALEXANDER,
United States Attorney.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

500

[File indorsement omitted.]

502 *Order assigning cause for hearing.*

Filed Oct. 31, 1921.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

[Title omitted.]

It is ordered that the above-entitled cause be, and it is, assigned for hearing at New Orleans, Louisiana, at ten o'clock a. m. November 26th, 1921.

It is further ordered that the clerk give notice of this order to the counsel of record in the cause.

Done at New Orleans, this 29th day of October, 1921.

R. W. WALKER,
United States Circuit Judge.
RUFUS E. FOSTER,
United States District Judge.

[File indorsement omitted.]

504 *Final decree.*

Filed Feb. 13, 1922.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

[Title omitted.]

This cause came on to be heard before the Honorable R. W. Walker, circuit judge, the Honorable W. I. Grubb, United States district judge, and the Honorable Edwin R. Holmes, United States district judge, sitting lawfully in pursuance of due notice given, whereupon the cause was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged, and decreed as follows:

1. That the motion of the United States to dismiss be, and the same is hereby, overruled, and leave to plead further not being asked but the cause being submitted for final decree, it is ordered, adjudged, and decreed that as to the United States complainant is entitled to the relief herein set forth;

2. Said cause was further considered upon the intervention of the Interstate Commerce Commission and its motion to dimiss, which is hereby disallowed and overruled, leave to plead further not being asked and said cause being ready for final decision, the relief hereinafter set forth is to be granted;

3. Said intervention of the Swift Lumber Company is hereby dismissed at the cost of the Swift Lumber Company, for which let execution issue;

505 4. It is hereby ordered, adjudged, and decreed that the United States, its agents, employes, and attorneys be and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce that certain order made by the Interstate Commerce Commission or the United States in that certain cause before said commission lately depending, styled, "Swift Lumber Company v. Fernwood, Columbia & Gulf Railroad Company, et al.," number 10827 upon its docket, wherein a final order was entered of date of April 5, 1921, whose effective date was from time to time postponed, and that all persons be, and they are hereby enjoined and restrained from in any way attempting to enforce or assert any right or title under said order of said Interstate Commerce Commission in said cause made, and that the same be hereby ordered and adjudged to be null and void and without any force or effect, and that to that end, perpetual injunction shall issue.

Ordered, adjudged, and decreed this the 10 day of February, 1921.

EDWIN R. HOLMES,
U. S. District Judge.
R. W. WALKER,
U. S. Circuit Judge.
O. J. GREELEY,
U. S. District Judge.

[File endorsement omitted.]

506 *Petition for appeal.*

Filed Mar. 3, 1922.

United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

United States of America, defendant, and Interstate Commerce Commission, and Swift Lumber Company, a corporation, intervening defendants, feeling themselves aggrieved by the final order or decree of the District Court dated February 10, 1922, and filed February 13, 1922, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein the defendant and the intervening defendants consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the defendant and the intervening defendants pray that a transcript of the record, proceedings, and papers on which the
507 final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. E. HINDMAN,
United States Attorney,
Southern District of Mississippi.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitors for Interstate Commerce Commission.
SWIFT LUMBER COMPANY,
By L. PALMER, *Attorney.*

[File endorsement omitted.]

509 *Assignment of errors.*

Filed Mar. 3, 1922.

United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

United States of America, defendant, and Interstate Commerce Commission and Swift Lumber Company, intervening defendants, now come by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court dated February 10, 1922, and filed February 13, 1922, in the above-entitled cause.

The District Court erred:

I. In granting the motion for preliminary injunction enjoining the order of the Interstate Commerce Commission entered April 5, 1921, and suspending the force and effect of the same, and in not denying the motion.

II. In overruling the motion of the United States to dismiss the petition and in not sustaining the motion.

510 III. In disallowing and overruling the motion of the Interstate Commerce Commission to dismiss the petition, and in not sustaining the motion.

IV. In dismissing the intervention of the Swift Lumber Company at the cost of the company.

V. In entering the following order:

It is hereby ordered, adjudged, and decreed that the United States, its agents, employees, and attorneys, be, and they are hereby perpetually enjoined and restrained from enforcing, or attempting to enforce, that certain order made by the Interstate Commerce Commission or the United States in that certain cause before said commission lately depending, styled, "Swift Lumber Company v. Fernwood, Columbia & Gulf Railroad Company et al.," number 10827 upon its docket, wherein a final order was entered of date of April 5, 1921, whose effective date was from time to time postponed, and that all persons be, and they are hereby, enjoined and restrained from in any way attempting to enforce or assert any right or title under said order of said Interstate Commerce Commission in said cause made, and that the same be hereby ordered and adjudged to be null and void and without any force or effect, and that to that end, perpetual injunction shall issue.

VI. In not finding and holding that the Interstate Commerce Commission on the record of the evidence and proceedings before it had the power and authority to make and enter the order; that the order rested on substantial evidence and that the questions sought to be raised by the bill of complaint were foreclosed by the findings of fact.

VII. In not dissolving the preliminary injunction and dismissing the bill of complaint for want of equity on the final hearing.

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court, dated February 10, 1922, and filed February 13, 1922, be reversed, annulled, and set aside,

511 with directions that the permanent injunction and the preliminary injunction shall be dissolved and the bill of complaint dismissed, and for such other and further order as may be appropriate.

E. E. HINDMAN,
United States Attorney,
Southern District of Mississippi.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER TORT,
Solicitors for Interstate Commerce Commission.
SWIFT LUMBER COMPANY,
By L. PALMER, *Attorney.*

[File endorsement omitted.]

512 *Order allowing appeal.*

Filed Mar. 11, 1922.

United States District Court, Southern District of Mississippi, Jackson Division.

[Title omitted.]

In the above-entitled cause, United States of America, defendant, and Interstate Commerce Commission and Swift Lumber Company, intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, dated February 10, 1922, and filed February 13, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United

513 States.

It is further ordered and decreed that complainant's exhibits filed in said cause and annexed to and made a part of the petition and marked Exhibits—

"A"—Complaint before commission, Swift Lumber Co.;
"B-1"—Answers of carriers;
"C"—Evidence before commission, and exhibits;
"D-1"—Briefs of counsel;
"E"—Examiner's report, March 29, 1920;
"F"—Exceptions to report, Swift Lumber Co.;
"G"—Exceptions to report, Fernwood & Gulf Co.;
"H-1"—Briefs of counsel;
"I"—Decision of commission, April 5, 1921;
"J-1"—Petitions for rehearing;

be incorporated in the record on appeal as original documents in lieu of copies thereof.

R. W. Walker,
United States Circuit Judge.
Edwin R. Holmes,
W. I. Grubb,
United States District Judges.

[File endorsement omitted.]

514 *Citation and service.*

Filed Mar. 11, 1922.

Citation on appeal.

UNITED STATES OF AMERICA, *ss:*

To Illinois Central Railroad Company and Fernwood, Columbia & Gulf Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Southern District of Mississippi, wherein United States of America, Interstate Commerce Commission, and Swift Lumber Company are appellants and you are appellees, to show cause, if any there be, why the final order or decree annulling and enjoining the order of the Interstate Commerce Commission entered against the appellants in the appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard W. Walker, United States circuit judge, the Honorable William I. Grubb and the Honorable Edwin R. Holmes, United States district judges, this day of March, 1922

R. W. WALKER,
United States Circuit Judge.
EDWIN R. HOLMES,
W. I. GRUBB,
United States District Judges.

Service of a copy of the within citation is hereby admitted and acknowledged this 9th day of March, 1922.

FERNWOOD, COLUMBIA & GULF R. R. Co.,
By MARCELLUS GREEN,
GARNER WYNN GREEN,
Solicitors for Appellee, Fernwood, Columbia & Gulf R. R. Co.

R. V. FLETCHER,
Solicitor for Illinois Central Railroad Company.

[File endorsement omitted.]

515 *Clerk's certificate.*

United States District Court for the Jackson Division of the Southern District of Mississippi.

I, Jack Thompson, clerk of the District Court of the United States for the Southern District of Missisippi, do hereby certify that the foregoing pages contains the correct and original records on file

in my office at Jackson, Miss., of the papers in the case of Illinois Central Railroad Company et al. vs. United States, No. 158, on the dockets of said court.

Witness my hand and seal of said court hereunto affixed at Jackson, Miss., in said district this March 22, 1922.

[SEAL.]

JACK THOMPSON,
Clerk U. S. District Court,
Southern District of Mississippi.

516 *Statement on behalf of the United States to omit certain parts in printing the transcript.*

Filed May 17, 1922.

In the Supreme Court of the United States, October Term, 1921.
[Title omitted.]

To the clerk:

Please omit from the printing of the transcript in the above-entitled cause the following matter, viz:

1. Brief for Fernwood & Gulf Railroad Co. (printed), signed by Messrs. Green & Green, filed February 6, 1920, with I. C. C.
2. Brief for Swift Lumber Co. (printed), signed by Mr. L. Palmer, filed February 6, 1920, with I. C. C.
3. Brief for defendants other than F. & G. R. R. Co., signed by Messrs. Humburg, Horton, Eaton, and Fletcher, of date February 10, 1920, and filed February 13, 1920, with I. C. C.
4. Stenographer's minutes (typewritten), date May 15, 1920, arguments of Mr. Garner W. Green and Mr. A. P. Humburg before I. C. C.
5. Argument (typewritten), signed by L. Palmer, attorney for complainant, consisting of 5 pages.
6. Letter (typewritten), Judge Foster to Mr. Thompson, clerk; date, August 11, 1921, filed August 12, 1921.

517 7. Telegram (typewritten), Messrs Green & Green to P. J. Farrell, Esq.; date, August 11, 1921.

8. Telegram (typewritten), Messrs. Green & Green to P. J. Farrell, Esq.; date, August 12, 1921.
9. Telegram (typewritten), Messrs. Green & Green to Blackburn Esterline, Esq.; date, August 12, 1921.
10. Telegram (typewritten), Messrs. Green & Green to Blackburn Esteline, Esq.; date, August 11, 1921.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

[File endorsement omitted.]

522 *Stipulation as to printing of record.*

Filed Sept. 18, 1922.

In the Supreme Court of the United States, October term, 1923.

In order to avoid the great expense and delay of reproducing the exhibits offered in evidence in this case, it is agreed by counsel for the parties that the pleadings and oral testimony shall constitute the record as printed for the use of this court, reserving the right to both parties to refer to the exhibits and to print any exhibit for the convenience of the court.

JAMES M. BECK,
Solicitor General.
R. V. FLETCHER,
Counsel for Appellees.

523 *Stipulation as to printing of record.*

Filed Sept. 18, 1922.

In the Supreme Court of the United States, October Term, 1923.

[Title omitted.]

In order to avoid the great expense and delay of reproducing the exhibits offered in evidence in this case, it is agreed by counsel for the parties that the pleadings and oral testimony shall constitute the record as printed for the use of this court, reserving the right to both parties to refer to the exhibits and to print any exhibit for the convenience of the court.

JAMES M. BECK,
Solicitor General.
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Appellees.

524

[File endorsement omitted.]

[Indorsement on cover:] File No. 28900. S. Mississippi D. C. U. S. Term No. 40. The United States of America, Interstate Commerce Commission, and Swift Lumber Company, Appellants, vs. Illinois Central Railroad Company and Fernwood, Columbia & Gulf Railroad Company. Filed May 1st, 1922. File No. 28900.

CONTENTS.

	Page.
STATEMENT	1
Tap Line cases, 234 U. S. 1	4
O'Keefe, Receiver, v. *United States*, 240 U. S. 294	4
McGowan-Foshee Lumber Co. v. *F. A. & G. R. R. Co., et al.*, 43 I. C. C. 581; 51 I. C. C. 317	4
ARGUMENT	6
I. THE FACTS BEFORE THE COMMISSION AMPLY SUSTAIN THE FINDING THAT SHIPPERS AT KNOXO ON THE LINE OF THE FERNWOOD & GULF WERE SUBJECTED TO UNDUE PREJUDICE IN VIOLATION OF SECTION 3	6
Section 3 (24 Stat. 379)	6
Section 15, as amended (36 Stat. 539, 551)	6
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57, 62	10
Houston & Texas Railway Co. v. *United States*, 234 U. S. 342, 356	11
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 220	11
Pennsylvania Co. v. *United States*, 236 U. S. 351, 361	12
Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170	12
United States v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320	12
O'Keefe, Receiver, v. *United States*, 240 U. S. 294, 302	13
Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340	16
Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247	16, 17
II. THE IMPAIRED FINANCIAL CONDITION OF THE FERNWOOD & GULF SHOULD NOT RENDER VOID THE ORDER OF THE COMMISSION	18
St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144, 145	18, 20
Regan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412	20
Covington, etc., Turnpike Co. v. *Sandford*, 164 U. S. 578	21
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549	22
CONCLUSION	23

CASES CITED.

	Pages.
Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247.	16, 17
Covington, etc., Turnpike Co. v. *Sandford*, 164 U. S. 578	21
Houston & Texas Railway Co. v. *United States*, 234 U. S. 342, 356	11
Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170	12
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549	22
McGowan-Foshee Lumber Co. v. *F., A. & G. R. R. Co. et al.*, 43 I. C. C. 581; 51 I. C. C. 317	4
O'Keefe, Receiver, v. *United States*, 240 U. S. 294, 302	4, 13
Pennsylvania Co. v. *United States*, 236 U. S. 351, 361	12
Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340	16
Regan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412	20
St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136	18, 20
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57, 62	10
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 220	11
Tap Line cases, 234 U. S. 1	4
United States v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320.	12

STATUTES CITED.

Act to Regulate Commerce:	
Section 3 (24 Stat. 379)	6
Section 15, as amended (36 Stat. 539, 551)	6

In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, INTERSTATE Commerce Commission and Swift Lumber Company, appellants,
v.
ILLINOIS CENTRAL RAILROAD COMPANY and Fernwood, Columbia & Gulf Railroad Company.
No. 40.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal is from the final order or decree of the District Court (Tr. 180) which perpetually annulled and enjoined the order of the Interstate Commerce Commission entered in the proceeding styled *Swift Lumber Company* v. *Fernwood, Columbia & Gulf Railroad Co., et al*, 61 I. C. C. 485 (Tr. 157). The Commission filed a full report with a finding of facts.

The substance of the bill of complaint is that the order is not sustained by the report or the evidence and is inconsistent therewith.

In all of that territory extending south from the east and west line of the Alabama & Vicksburg Railway to the Gulf of Mexico and east of the Mississippi River for a distance of about 200 miles lies practically all of the yellow-pine production on the lines of the Illinois Central and the affiliated Yazoo & Mississippi Valley Companies. From all points in that territory, both on their main lines and on their branches, the Illinois Central and Yazoo & Mississippi Valley blanket their rates on yellow-pine lumber and its products to Ohio River crossings and points taking the same rates; to the territory beyond the Ohio River crossings, including eastern and Virginia cities; and to points in Kentucky and Tennessee on their own lines and on the lines of certain other carriers. Points on the main line and branch lines of the New Orleans Great Northern, which also operates in that territory, are similarly blanketed. (Tr. 147.)

Operating well within that territory is also the Fernwood, Columbia & Gulf (known in the record as Fernwood & Gulf), which is a single-track line of standard gauge, extending from a connection with the Illinois Central at Fernwood, Miss., eastwardly for 32 miles. Knoxo is 27 miles from Fernwood, and at Tylertown, a point 6 miles west of Knoxo, there is a connection with a branch of the New Orleans Great Northern. Fernwood and Tylertown were the only junction points with the other carriers at the time of

the hearing, but at the time the Commission filed its report the line had been extended 12 miles eastwardly through Foxworth, Miss., where it connects with the New Orleans Great Northern to a connection with the Gulf & Ship Island at Columbia, Miss. (Tr. 146.)

Swift Lumber Company, complainant before the Commission, was engaged in the manufacture of lumber and lumber products at Knoxo, Miss., and shipped its products over the Fernwood & Gulf to various interstate destinations reached by the above-mentioned trunk-line connections of that carrier.

The following findings clearly set forth the basis of the complaint, viz (Tr. 146):

> Prior to 1908 the only trunk-line connection of the Fernwood & Gulf was the Illinois Central, and prior to May 21, 1906, lumber rates from all points on its line to all destinations were made by combining its full local rates to Fernwood with the rates beyond. Effective on that date, rates were published from local points which were 2 cents higher than the rates from Fernwood, and this is the present basis for joint rates to Ohio River crossings and points beyond. To Memphis, Tenn., New Orleans, La., and some other points south of the Ohio River this arbitrary has been increased to 2.5 cents in accordance with General Order No. 28 of the Director General of Railroads. To certain points in Tennessee there are no joint rates from Knoxo, and the applicable combination rates, based on Fernwood, exceed the junction-

point rates by more than 2.5 cents. Rates from Fernwood and Tylertown via the Fernwood & Gulf do not exceed the respective rates from those points by way of the Illinois Central or the New Orleans Great Northern. The arbitraries over the junction-point rates accrue to the Fernwood & Gulf and in addition it receives a division of 2 cents per 100 pounds out of the joint rates.

It had not been the practice of the trunk lines to extend the junction-point, or blanket, basis of rates on lumber to points on short-line railroads in this territory (Tr. 146), and the general, although not the universal, practice throughout the Southwest had been to make rates from local points on independent short lines by adding an arbitrary to the rates from the junction point. However, in the *Tap Line Cases*, 234 U. S. 1, and *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, the trunk lines had blanketed the rates with divisions to the short lines in Arkansas, Missouri, Louisiana, and Texas.

In *McGowan-Foshee Lumber Company* v. *F., A. & G. R. R. Co. et al.*, 43 I. C. C. 581; 51 I. C. C. 317, the Commission fixed reasonable divisions to the short-line points of joint rates prescribed on yellow-pine lumber, in carloads, from Falco, Ala., to destinations on and north of the Ohio River and to points on the Louisville & Nashville in Tennessee and Kentucky at 3 cents per 100 pounds and, while not eliminating the arbitrary entirely, the carriers were required to apply the blanket basis from Falco (51 I. C. C. 317, 318). The Louisville & Nashville Railroad Company,

the most formidable of all challengers of orders of the Commission, not only did not attack the order in that case but it never raised preliminary objections to the tentative report of the Examiner which was made the final report of the Commission (51 I. C. C. 322). In the instant case, the Commission, by its order, simply ordered for the shippers on the short lines what had long existed in the territory to the west.

The order of the Commission (Tr. 157) directs the carriers—

> to cease and desist on or before August 5, 1921, and thereafter to abstain from publishing, demanding, and collecting any rates for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the Ohio River crossings, to destinations in Wisconsin, Minnesota, Iowa, and Missouri, to destinations in central and eastern trunk line territories, and to destinations in Tennessee and Kentucky, the rates to which are blanketed from yellow-pine producing points on the Illinois Central and New Orleans Great Northern railroads south of Jackson, Miss., in excess of the rates contemporaneously published, demanded, or collected by them for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

The carriers were further directed (Tr. 158)—

> to maintain and apply to the transportation of yellow-pine lumber, timber, and

lumber products, in carloads, from Knoxo, Miss., to the destinations described in the next preceding paragraph, rates not in excess of the rates contemporaneously maintained and applied by them to the transportation of yellow-pine lumber, timber, lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

ARGUMENT.

I.

THE FACTS BEFORE THE COMMISSION AMPLY SUSTAIN THE FINDING THAT SHIPPERS AT KNOXO ON THE LINE OF THE FERNWOOD & GULF WERE SUBJECTED TO UNDUE PREJUDICE IN VIOLATION OF SECTION 3.

Section 3 provides (24 Stat. 379, 380):

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15 as amended provides (36 Stat. 539, 551):

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, * * * (*either in extension of any pending complaint or without any complaint whatever*), the Commission shall be of opinion that any individual or joint rates

> * * * regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are * * * *unduly preferential or prejudicial* or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation *to the extent to which* the Commission finds the same to exist, * * *. (Italics ours.)

The Commission itself very clearly stated the precise question raised and decided; thus (Tr. 149):

> The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers, and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefit to these other short-line points and specifically, in this case, to Knoxo on the line of the Fernwood & Gulf.

The facts which establish undue prejudice to shippers at Knoxo on the line of the Fernwood & Gulf are equally clearly stated; thus (Tr. 148, 150):

> The Fernwood & Gulf is well within this blanket territory and nearer to the northern boundary than to the southern. The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of New Orleans on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch, but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the main line of the former road at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distances to Memphis, Tenn., through which point most of the traffic with which we are here concerned moves, are 115 miles greater via Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown and 96 miles greater by

way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory.

* * * * *

We find nothing of record in this case which warrants a deviation from the conclusions reached in *McGowan-Foshee Lumber Co.* v. *F., A. & G. R. R. Co., supra*. We do not find that the rates on yellow-pine lumber, timber, and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable, except that we find that the rates to points in Tennessee, which were made by combination of the local rates to and beyond Fernwood, were unreasonable to the extent that they exceeded the corresponding contemporaneous rates from Fernwood to the same destinations by more than 2.5 cents per 100 pounds. We do find, however, that subsequent to January 1, 1919, the rates on yellow-pine lumber, timber, and lumber products from Knoxo to Ohio River crossings. to points in Wisconsin, Minnesota, Iowa, and Missouri, to points in central and eastern trunk line territories, and to points in Tennessee and Kentucky the rates to which are blanketed from points producing yellow pine on the Illinois Central and New Orleans Great Northern Railroads south of Jackson, Miss., were, and for the future they will be, unduly prejudicial to complainant to the

extent that they exceed the blanket basis of rates from Fernwood, Tylertown, and Foxworth.

In *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, 62, commonly known as the *Richmond Switching Case*, the order of the Commission was sustained as within its authority under section 2, which was primarily directed against discrimination between shippers located in the same community. The carriers argued that the discrimination was justified because of the competition among the carriers. In rejecting the argument and sustaining the order, this Court, speaking by Mr. Justice Day, said:

> We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.
>
> Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions

> can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-Cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.

In *Houston & Texas Railway Co.* v. *United States*, 234 U. S. 342, 356, this Court, speaking by Mr. Justice Hughes, said:

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (See also *Sou. Ry. Co.* v. *United States*, 204 Fed. 465; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 118 Fed. 163.)

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates.

Section 3 forbids discrimination of any kind whatsoever.

In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 220, this Court said:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Com-

> mission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

What is undue or unreasonable preference or advantage is a question not of law but of fact. (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Texas & Pacific Ry. Co.* v. *United States*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170.)

The determination of this question of fact is for the Commission, and its findings are conclusive. In *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320, this Court said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Central R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts,

> disputed or undisputed, in a given case preference or discrimination existed. *East Tenn., etc., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving the purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

In *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, 302, this Court, speaking by Mr. Justice Pitney, said:

> Next it is insisted that the Commission applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element in determining whether a division is just and reasonable or unlawfully discriminatory. The order is not open to this criticism. It not only takes competitive conditions into consideration but establishes the maximum divisions for the very purpose of preventing preferences, discriminations, and rebates as methods of competition.

Concerning itself, the Fernwood & Gulf avers "that it is an independently owned and operated line, not affiliated with, controlled by, or dictated to by any of its connections." It further avers that "under the act to regulate commerce and the Fifth Amendment and the Federal Constitution its individualization can not be merged into a policy by connecting carriers whose interests are adverse and whose policies are constructed for their own conservation, even though in so being they involved the disorganization and destruction of the Fernwood Company." (Tr. 10, 11.)

As justification for extending the junction-point rates to points on the Mississippi Central Railroad and participating in through rates on lumber originating on certain small railroads, including the Alabama & Mississippi, the Mississippi & Western Railroad, the Cybur & Northern Railroad, and the Pearl River Valley Railroad, the Illinois Central avers "that all of the testimony offered in this case clearly indicates that the conditions surrounding the making of rates to points on the Mississippi Central Railroad are entirely different from those that attend the making of rates from Knoxo, the point involved in this case, and that the Illinois Central Railroad in extending junction-point rates on the Mississippi Central acted under the force of compelling competition, and could not therefore be guilty of discrimination, and that this action can not constitute discrimination as against Knoxo. So far as the other short-line railroads mentioned in the commission's decision are

concerned, no one of them is a connection of the Illinois Central or of the Fernwood, Columbia & Gulf Railroad and these complainants can not therefore in any sense be responsible for rates which prevail on those roads." (Tr. 14.)

Referring to the latter roads the Commission found (Tr. 147):

> It is to be observed that none of these roads connects with either the Illinois Central or the New Orleans Great Northern, yet both these defendants concur in joint rates on the blanket basis from local points on these short lines. It appears, however, that if the Illinois Central and the New Orleans Great Northern should refuse to concur in these joint rates, similar rates would still apply to most destinations via other routes.

On the subject of competition the Commission said (Tr. 149, 150):

> Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.
>
> If neither cost of service nor competition justifies the discrimination, what circumstances are there surrounding points located, like Knoxo, on independent short lines which make it reasonable that they should be excluded from the benefits of the blanket system? * * * Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary

> consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points.

Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340, has no application. In that case this Court, speaking by Mr. Justice McReynolds, said:

> Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself *or in relation to others;* * * *.

Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247, is against the appellees. In that case this Court, speaking by Mr. Justice Brandeis, said (p. 256):

> But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, * * *.

Appellees allege and argue that the rates found by the Commission as unduly prejudicial are justified.

Appellees not only do not disclaim any responsibility, but they stoutly defend all that has been found against them.

On the power of the Commission to remove discrimination and undue prejudice, in the *Central Railroad Company of New Jersey Case, supra*, the court further said (p. 259):

> It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Sec. 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18.

II.

THE IMPAIRED FINANCIAL CONDITION OF THE FERNWOOD & GULF SHOULD NOT RENDER VOID THE ORDER OF THE COMMISSION.

It is no answer on the part of appellees that the Fernwood & Gulf was once a tap line (Tr. 146); that independent short lines are likely to be abandoned with the depletion of the timber areas; that the short lines do not furnish their commensurate quota of equipment (Tr. 150), and other arguments along the same line. The Illinois Central Railroad Company and the Fernwood, Columbia & Gulf Railroad Company, joint complainants in the bill, and appellees here, allege that they sue "on behalf of themselves and of other carriers affected by the order hereinafter complained of" (Tr. 1).

The District Court filed no opinion, but if in entering its decrees it was influenced by the finding of the Commission that (Tr. 148)—

> The Fernwood & Gulf shows that it has operated at a loss, and that the loss would be greater if its revenue on lumber were reduced by the amount of the arbitrary, since lumber supplies 93 per cent of its total traffic,

that Court committed error for two main reasons.

(1) In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144, 145, this Court, speaking by Mr. Justice Brandeis, said:

> Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly

> framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

The order did not direct the carriers to reduce rates and they were authorized by an order drawn in the alternative to remove the discrimination "by raising the lower rate or by lowering the higher rate or by doing both."

(2) Fernwood & Gulf has placed its case on a further contention which is "transparently unsound." It avers (Tr. 9, 10):

> A fully equipped railroad built on a circle with a radius of 100 miles from the North Pole would be, at the present day, utterly valueless; there would be no traffic. And differing only in degree will be the railroad of the Fernwood Company, running into a logged-off barren, where there will be nothing for it to haul and no use to which it could be put. The Fernwood Company avers that the failure to provide against the loss incident to depreciation, depletion, and obsolescence has been the undoing of more enterprises than any other single cause, and that under the Constitution a carrier, circumstanced as it is, has a right to exact, under the fifth amendment, a capital return reserve to be imposed against each tim-

> ber unit removed from the tributary territory. And complainants aver that said commission, when they failed to give effect to this right, thus vouchsafed under the Constitution, exceeded the statutory powers, invaded the constitutional rights, and the order made therefor was void.

In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 142, this Court, speaking by Mr. Justice Brandeis, said:

> *First.* The carriers deny that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce.
>
> * * * * *
>
> The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186.

In *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412, this Court said:

> It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible

without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

In *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596, this Court said:

> * * * we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It can not be said that a corporation is entitled, as of right and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged

> here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and consequently a diminution in the tolls collected, that is not in itself a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property. The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public.

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549, this Court said:

> Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not

sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates can not be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article over a particular road to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

CONCLUSION.

Annexing to the bill of complaint (Tr. 6) a copy of the report of the Commission as Exhibit I (Tr. 145), complainants assail the validity of the order as not sustained by the facts.

The United States filed a motion to dismiss, setting forth, among other grounds, that the bill of complaint is without equity on its face. (Tr. 163.) The District Court entered an order granting the pre-

liminary injunction (Tr. 167), the United States elected to stand, and the order granting the preliminary injunction was made permanent by the final decree (Tr. 71, 80).

The judgment should be reversed and the cause remanded with directions to the District Court to sustain the motion to dismiss and to dismiss the bill of complaint for want of equity.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

○

INDEX.

Page.

STATEMENT OF THE CASE 1

PROCEEDINGS BEFORE THE COMMISSION 6

PROCEEDINGS IN THE DISTRICT COURT 10

ASSIGNMENTS OF ERROR 11

ARGUMENT:

I. THE COMMISSION'S PROCEDURE WAS REGULAR 12

II. THE SWIFT LUMBER COMPANY WAS NOT ESTOPPED FROM COMPLAINING OF THE RATES FROM KNOXO 13

III. THE COMMISSION'S ORDER DOES NOT REQUIRE ESTABLISHMENT OF CONFISCATORY RATES 14

IV. THE VALIDITY OF THE COMMISSION'S ORDER IS NOT TO BE TESTED BY THE POLICY OF THE RAILROADS 15

V. THE FACTS JUSTIFY THE COMMISSION'S FINDING OF UNDUE PREJUDICE 16

CONCLUSION 31

TABLE OF CASES CITED.

Atchison Ry. Co. v. *United States*, 232 U. S. 199 16

Central Railroad of New Jersey v. *United States*, (*Jersey Central Case*) 257 U. S. 246 ..... 16, 23, 24, 26

Chamber of Commerce of Ashburn, Ga., v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140 22

Chamber of Commerce of Newport News v. *S. Ry. Co.*, 23 I. C. C. 345 .. 21

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184 28

Elk Cement & Lime Co. v. *B. & O. R. R. Co.*, 22 I. C. C. 84 22

Greenbaum Co. v. *C. & O. Ry. Co.*, 25 I. C. C. 352 22

Greenbaum Co. v. *L. & N. R. R. Co.*, 31 I. C. C. 699 22

Houston & Texas Ry. v. *United States*, 234 U. S. 342 31

Page.

Indiana Steel & Wire Co. v. *C., R. I. & P. Ry.*, 16 I. C. C. 155..... 19, 22
Interstate Commerce Commission v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88..... 15
Interstate Comm. Comm. v. *Ill. Cent. R. R.*, 215 U. S. 452..... 16
Int. Comm. Comm. v. *Del., L. & W. R. R. Co.*, 220 U. S. 235..... 16
Int. Comm. Comm. v. *Union Pacific R. R.*, 222 U. S. 541..... 16
Jersey Central Case (*Central Railroad of New Jersey* v. *United States*, 257 U. S. 246)..... 16, 23, 24, 26
LaGrange Chamber of Commerce v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178..... 22
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457..... 16
O'Keefe v. *United States*, 240 U. S. 249..... 16
Paducah Case (*St. Louis-S. W. Ry. Co.* v. *United States*, 1245 U. S. 136)..... 26, 28, 29
Partridge & Sons Co. v. *P. R. R. Co.*, 26 I. C. C. 484..... 22
Penna. R. R. Co. v. *International Coal Co.*, 230 U. S. 184..... 30
Procter & Gamble v. *United States*, 225 U. S. 282..... 16
Rates on lumber from Southern Points, 34 I. C. C. 652..... 22
Rates from Walsenberg Coal Field, 26 I. C. C. 85..... 22
R. R. Commission of Tennessee v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418..... 19, 22
Seaboard Air Line Ry. Co. v. *United States*, 254 U. S. 62..... 16
Sheridan Chamber of Commerce v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250..... 22
Southern Pacific Co. v. *Darnell-Taenzer Co.*, 245 U. S. 531..... 30
Southern Pacific Co. v. *Interstate Commerce Comm.*, 219 U. S. 433..... 14
Southern Ry. Co. v. *United States*, 204 Fed. 465..... 22
Swift Lumber Company v. *F. & G. R. R. Co.*, 61 I. C. C. 485..... 1
St. Louis-S. W. Ry. Co. v. *United States* (*Paducah Case*, 245 U. S. 136..... 26, 28, 29
United States v. *Union Stock Yard*, 226 U. S. 286..... 14
United States v. *Louis. & Nash. R. R. Co.*, 235 U. S. 314..... 16

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, et al., appellants,
v.
ILLINOIS CENTRAL RAILROAD COMPANY ET al., appellees.
} No. 40.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Southern District of Mississippi (Walker, Circuit Judge, and Grubb and Holmes, District Judges) perpetually enjoining the enforcement of the order of the Interstate Commerce Commission in *Swift Lumber Company* v. *F. & G. R. R. Co.*, 61 I. C. C. 485.

The case before the Commission arose upon complaint of the Swift Lumber Company, in which it was alleged that the rates on yellow pine lumber and lumber products from Knoxo, Miss., to various destinations, most important of which were the Ohio River crossings and points beyond, were unreasonable, and

unduly prejudicial to the Lumber Company and to Knoxo as compared with rates on yellow pine lumber and lumber products from surrounding points to the same destinations. Reparation was asked as to shipments which had been made under the rates complained of, and reasonable, nondiscriminatory, and nonprejudicial rates were sought for the future. All the railroad companies participating in the traffic were made defendants.

The facts upon which the Commission's order was based were set forth in its report (Rec. 145) and are here summarized. (Reference to the map, Appendix B hereto, will be helpful.)

The only railroad which reaches Knoxo is the Fernwood & Gulf. This railroad, at the time of the hearing, extended eastwardly from Fernwood, Miss., a distance of about 32 miles. It connected with the Illinois Central Railroad at Fernwood and with the New Orleans Great Northern Railroad at Tylertown, a point 21 miles east of Fernwood. Knoxo, where the Lumber Company's mill is located, is about 6 miles east of Tylertown and about 27 miles east of Fernwood. Since the hearing, the line of the Fernwood & Gulf has been extended some 12 miles farther eastward to Columbia, Miss., passing through Foxwood, Miss., where another connection was made with the New Orleans Great Northern.

The Illinois Central and the New Orleans Great Northern are north and south lines, so-called trunk lines. The Illinois Central reaches many of the destinations involved with its own rails and other

destinations through its connections. The New Orleans Great Northern reaches the destinations through its connections.

Practically all of the yellow pine producing territory through which the Illinois Central and the New Orleans Great Northern pass lies between Jackson, Miss., and the Gulf of Mexico, some 200 miles south of Jackson. The rates on lumber and lumber products from all points in this territory on the main and branch lines of these carriers and of the Yazoo & Mississippi Valley Railroad Company, which is affiliated with the Illinois Central, are grouped or blanketed to the destinations involved, which include all important consuming points; that is to say, the rates are the same from all such points to the same destinations regardless of the distance. From Knoxo, which is well within the blanket territory and nearer the northern boundary than the southern, the rates are, generally speaking, 2 cents per 100 pounds higher than the blanket rates. To some destinations they are 2½ cents per 100 pounds higher. The distances from Knoxo to destinations are less than the distances from many points taking the blanket rates.

In the Commission's report it was said (Rec. 148):

> The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of

New Orleans on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch; but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the main line of the former road at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distances to Memphis, Tenn., through which point most of the traffic with which we are here concerned moves, are 115 miles greater via Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown, and 96 miles greater by way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory.

The Fernwood & Gulf concurs in the blanket rates from Fernwood, its junction point with the Illinois Central, and from Tylertown and Foxworth, its junction points with the New Orleans Great Northern, and participates in transportation under these rates. For example, the blanket rates apply to movements

from Foxworth via the Fernwood & Gulf to Tylertown and the New Orleans Great Northern beyond or via Fernwood and the Illinois Central beyond.

It has not been the policy of either the Illinois Central or the New Orleans Great Northern to join in group or blanket rates from points on independent lines in this territory with which they connect. As a rule, rates from points on such independent lines are higher than the blanket rates by from 1 cent to 4 cents per 100 pounds. There are eight independent short lines connecting directly with the Illinois Central and two independent short lines connecting directly with the New Orleans Great Northern. Blanket rates do not apply from points on these lines. However, both the Illinois Central and the New Orleans Great Northern join in blanket rates from points on the Mississippi Central Railroad, an east and west independent line 160 miles long, operating in this territory. But before either the Illinois Central or the New Orleans Great Northern established connections with the Mississippi Central, other north and south trunk lines had established such connections and rates had been made on the blanket basis from points on the Mississippi Central via these other trunk lines. If the Illinois Central and the New Orleans Great Northern should withdraw from the blanket rates applicable from points on the Mississippi Central, blanket rates would still remain in effect via other routes.

There are three independent short lines, the Alabama & Mississippi, the Mississippi & Western,

and the Pearl River Valley, points on which take the blanket-rate basis. Blanket rates from these points are participated in by the Illinois Central and the New Orleans Great Northern, but neither of them connects directly with any one of these short lines.

PROCEEDINGS BEFORE THE COMMISSION.

A hearing was held before an examiner for the Commission, and evidence was introduced in support of the facts recited above. The examiner prepared a proposed report, in accordance with the practice of the Commission, which was served on the parties. In the proposed report it was stated that the Commission should find that rates from Knoxo which were higher by 2 cents per 100 pounds to certain destinations and by 2½ cents per 100 pounds to certain other destinations, than the blanket rates from Fernwood and Tylertown, were not unreasonable or unjustly discriminatory or unduly prejudicial to Knoxo. (Rec. 137.)

Exceptions were taken to the examiner's report, briefs were filed, and there was oral argument on May 15, 1920, before a Division of the Commission consisting of Commissioners Hall, Daniels, and Woolley.

On April 5, 1921, the Commission issued its report through Commissioner Eastman, which was concurred in by five commissioners, with three commissioners dissenting and one commissioner not participating. Among the dissenting commissioners were Commissioners Hall and Daniels. (Rec. 151, 152, 154.)

Commissioner Woolley had ceased to be a member of the Commission. (Rec. 6.)

The Commission found that the rates from Knoxo had not been shown to be unreasonable, but that they were unduly prejudicial to the Swift Lumber Company to the extent they exceeded "the blanket basis of rates from Fernwood, Tylertown, and Foxworth."

In its report the Commission stated, among other things: (Rec. 149, 150.)

> The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers, and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefit to these other short-line points and specifically in this case, to Knoxo on the line of the Fernwood & Gulf.
>
> Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other

points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense, but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.

* * * * *

Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points.

The Commission ordered that defendants, "according as they may participate in the transportation," cease and desist from publishing rates from Knoxo to the destinations involved in excess of rates contemporaneously published from Fernwood, Tyler-

town, and Foxworth, and ordered, further, that defendants establish rates from Knoxo for the future no higher than the rates contemporaneously in effect from Fernwood, Tylertown, and Foxworth.

The language of the order is in part as follows (Rec. 157):

> *It is ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 5, 1921, and thereafter to abstain, from publishing, demanding, or collecting any rates for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the Ohio River crossings, to destinations in Wisconsin, Minnesota, Iowa, and Missouri, to destinations in central and eastern trunk line territories, and to destinations in Tennessee and Kentucky, the rates to which are blanketed from yellow-pine producing points on the Illinois Central and New Orleans Great Northern railroads south of Jackson, Miss., in excess of the rates contemporaneously published, demanded, or collected by them for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.
>
> *It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 5, 1921, upon notice to this Commission and

to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the destinations described in the next preceding paragraph, rates not in excess of the rates contemporaneously maintained and applied by them to the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

PROCEEDINGS IN THE DISTRICT COURT.

The Illinois Central Railroad Company and the Fernwood & Gulf Railroad Company filed a bill in the United States District Court for the Southern District of Mississippi (Rec. 1), seeking to enjoin the enforcement of the Commission's order and alleging grounds which may be summarized as follows:

1. The procedure before the Commission was irregular. In this connection it was alleged that on April 5, 1921, when the Commission's report concurred in by five Commissioners was issued, the Commission was composed of eleven members.

2. The Commission was without jurisdiction to make the order on complaint of the Swift Lumber Company because that company was estopped from complaining of the rates from Knoxo by a contract which it had entered into with the Fernwood Lumber Company, predecessor in interest to the Fernwood & Gulf Railroad Company.

3. The order, in its application to the Fernwood & Gulf Railroad, would result in confiscatory rates.

4. The requirement of the order that blanket rates be published from Knoxo is contrary to the established policy of the Illinois Central and the Fernwood & Gulf.

5. There is no evidence to support the Commission's order. This fifth ground relates only to the ultimate finding by the Commission of undue prejudice. There is no dispute as to the facts. The contention is merely that these facts do not constitute undue prejudice.

The United States filed a motion to dismiss the bill. The Commission intervened and filed an answer which included a denial that it was composed of eleven members at the time its report and order was issued and an allegation that it was composed of nine members at that time.

The Swift Lumber Company also intervened.

No evidence was introduced before the District Court, except a certified copy of the record before the Commission. The court issued a temporary injunction which was later made perpetual, but rendered no opinion.

ASSIGNMENTS OF ERROR.

The United States, the Commission, and the Swift Lumber Company perfected a joint appeal and made general assignments of error to the effect that the District Court erred in issuing the injunction. (Rec. 181.)

ARGUMENT.

I.

THE COMMISSION'S PROCEDURE WAS REGULAR.

The contentions concerning alleged irregularities are apparently based on the following facts: The Commission did not adopt the conclusions proposed by the examiner; the oral argument was heard only by a division of the Commission; and the report of the Commission was concurred in by only five Commissioners.

The report proposed by the examiner was merely for the convenience of the parties and of the Commission and had no standing in law. The only report recognized by the statute is the report of the Commission. The Commission can, of course, either accept or reverse the examiner's findings. The division, in hearing oral argument, acted for the full Commission, and this is authorized by section 17 of the Interstate Commerce Act. It is clear that appellees were not prejudiced because the oral argument was before a division of the Commission instead of the full Commission. The case was briefed and furthermore the oral argument was transcribed, bound in the record with the evidence, and available to all the Commissioners.

The contention that the report was not adopted by a majority of the Commission is based upon the assumption that there were eleven members of the Commission on April 5, 1921, as alleged in the bill,

whereas, in fact, as alleged in the Commission's answer (Rec. 165) there were only nine members of the Commission at that time, there being two vacancies. It is the general rule that a decision by a majority of a tribunal holding office is valid, the only exceptions resulting from statutes. In this case, the general rule is supported by the statute, section 11 of the Interstate Commerce Act providing:

> No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

II.

THE SWIFT LUMBER COMPANY WAS NOT ESTOPPED FROM COMPLAINING OF THE RATES FROM KNOXO.

It is contended by appellees that the Commission was without jurisdiction to make an order on complaint of the Swift Lumber Company, because the Lumber Company was estopped from complaining of the rates from Knoxo, having agreed with the predecessor in interest of the Fernwood & Gulf, for a valuable consideration, to ship all of its lumber by that road under the established rate adjustment. But the only agreement by the Swift Lumber Company was to ship via the Fernwood & Gulf, nothing being said in the contract about the rates. (See Appendix A hereto.)

In passing, it might be said that if the railroad company gave valuable considerations to the lumber company and in return the lumber company agreed to ship its output over the line of the railroad com-

pany, with or without any understanding as to rates, the considerations passing to the lumber company amounted to a rebate and the agreement was void. *United States* v. *Union Stock Yard*, 226 U. S. 286. Moreover, no contract of this kind could work an estoppel against the Swift Lumber Company or deprive the Commission of its juridsiction. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433.

III.

THE COMMISSION'S ORDER DOES NOT REQUIRE ESTABLISHMENT OF CONFISCATORY RATES.

The Fernwood & Gulf claims that the Commission's order would result in confiscatory rates. It alleges that it is operating at a loss now; that lumber comprises some 93 per cent of its traffic; that in time the lumber on its line will be exhausted and there will be no traffic to take its place, and that it is therefore entitled to earn not only a fair return on its investment but a sum in addition to make good the alleged year-to-year depletion in the value of its property. It makes no further showing. We do not understand that the Illinois Central makes any claim of confiscation; certainly it makes no showing whatever to support such a claim.

This contention is based upon the erroneous assumption that compliance with the Commission's order would reduce the revenue of the Fernwood & Gulf. The order does not require the reduction of any rate. It does not fix rates, but merely the

adjustment of rates. It would be satisfied if the blanket rates, applicable from Fernwood, Tylertown, etc., were raised to the level of the rate applicable from Knoxo. Moreover, even if the order required the reduction of the Knoxo rate, this would not necessarily result in a reduction of revenue of the Fernwood & Gulf. That would depend upon the division of the new rate. The Fernwood & Gulf could come to the Commission to have just and reasonable divisions fixed. After that, and not before, conceivably, the question of confiscation might arise.

IV.

THE VALIDITY OF THE COMMISSION'S ORDER IS NOT TO BE TESTED BY THE POLICY OF THE RAILROADS.

The Illinois Central asserts that its policy has been not to extend blanket rates to points on independent short lines in this territory and that the Commission can not interfere with this policy. The Fernwood & Gulf takes a similar position, asserting that its policy has been not to join in rates on the blanket basis from points on its line.

But the validity of the Commission's order is not to be tested by the policy of the railroads. They are free to adhere to their policies only in so far as they are not in violation of the law.

In *Interstate Commerce Commission* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, 102, 103, the court said:

> The Commission was instituted to prevent discrimination between persons and places

and the outlook of the Commission and its powers must be greater than the interests of the railroads or of that which may affect those interests.

V.

THE FACTS JUSTIFY THE COMMISSION'S FINDING OF UNDUE PREJUDICE.

Whether the disadvantage to Knoxo amounts to undue prejudice is a question for the Commission and the court will not review the Commission's finding if it is supported by evidence. *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452 at 470; *Int. Comm. Comm.* v. *Del., L. & W. R. R. Co.*, 220 U. S. 235 at 251; *Int. Comm. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541 at 547; *Procter & Gamble* v. *United States*, 225 U. S. 282; *Atchison Ry. Co.* v. *United States*, 232 U. S. 199 at 220; *United States* v. *Louis. & Nash. R. R. Co.*, 235 U. S. 314 at 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457 at 481, 488; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 62; *O'Keefe* v. *United States*, 240 U. S. 249.

The facts stated hereinbefore, as to which there is no dispute, constitute ample evidence to support the Commission's finding.

Whether the prejudice is attributable in law to the appellees is the only question for review here. *Central Railroad of New Jersey* v. *United States*, 257 U. S. 247.

On this point appellees say, in Paragraph XV of their bill (Rec. 12):

> Complainants aver that said Commission was further without power to enter said order, coordinating the rates upon the independent short lines, with the rates existing upon the trunk lines, and their branches, because complainants say that none of said trunk lines reach Knoxo, Mississippi, and that the Fernwood Company is the only company therefrom moving yellow pine tonnage, and that said movement is at rates that are reasonable in and of themselves; * * * and complainants aver that it is not within the power of the Commission to coordinate the rates of one carrier to and with the rates of another and distinct carrier; nor is it within the power of the Commission to admeasure the rates to be charged by one carrier for services on its line with those upon other and differently situated lines, and compel each line, when the rates thereon charged are reasonable, to observe the rates promulgated by its competitors. * * *

As stated hereinbefore, the Fernwood & Gulf does participate in transportation from Fernwood, Foxworth, and Tylertown, under the blanket rates; that is, it participates in transportation under these rates from Fernwood, its junction with the Illinois Central, on traffic which does not move via the Illinois Central, but moves instead via the Fernwood & Gulf to one of its junctions with the New Orleans Great Northern and via the latter carrier beyond. So, also, as to transportation from Foxworth or Tylertown, its junctions with the New Orleans Great Northern, which does not move via the New Orleans

Great Northern but, instead, via the Fernwood & Gulf to Fernwood, and the Illinois Central beyond.

But the Commission's order would be valid in the absence of participation by the Fernwood & Gulf in such rates.

The question then presented is whether the Commission is precluded from finding the relationship between two rates unduly prejudicial when one or more carriers participate in the transportation under both rates, but another carrier participates in the transportation under one rate only.

For example: On lumber moving from the points taking the blanket rate the Illinois Central and its northern connections perform the entire transportation. On lumber moving from Knoxo to the same destinations the Fernwood & Gulf performs the transportation for 27 miles from Knoxo to Fernwood and the Illinois Central and its northern connections perform the transportation for hundreds of miles from Fernwood to destination.

The relationship which the Commission found unduly prejudicial to Knoxo was the relationship between the blanket rates and the rates from Knoxo to the same destinations. As pointed out above, the identical carriers which perform the transportation under the blanket rates perform all the transportation, several hundred miles, under the rates from Knoxo, except that 27 miles performed by the Fernwood & Gulf.

Is the Commission powerless to remove the prejudice simply because the Fernwood & Gulf, which

does not participate in the transportation under the blanket rates, does participate for an extremely short distance in the transportation from Fernwood?

This question has been before the Commission literally hundreds of times and the Commission has always held that it was not without power to remove a prejudice arising from the improper relationship of two rates, when one or more carriers were parties to both rates, simply because one of the carriers which participated in transportation under the one rate did not participate in transportation under the other rate.

Indiana Steel & Wire Co. v. *C., R. I. & P. Ry.*, 16 I. C. C. 155, decided in 1909, was one of the early cases in which the question arose. The Commission there found that rates from Kokomo and Muncie, Ind., to Arkansas common points were prejudicial as compared with the rates from Chicago to the same destinations. The only carriers which served Kokomo and Muncie did not participate in the transportation from Chicago; but to Arkansas points the traffic from Chicago and the traffic from Muncie and Kokomo moved over the same railroads west of the Mississippi River crossings.

In *R. R. Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418, it was found that the rate on cotton from Jackson, Tenn., to New England mills was unduly prejudicial as compared with the rate on cotton from Brownsville, Tenn., to the same destinations. The Louisville & Nashville was the only road serving Brownsville, and it did not participate in the

transportation from Jackson. North of the Ohio River the transportation from Jackson and from Brownsville was over the same railroads. The Commission said at page 421:

> It is urged, further, that the line from Brownsville to destination is not the same as the line from * * * Jackson. But this is not a question under the fourth section, and therefore not a question of the same line. The inquiry is, Do these defendants by their joint rates unduly discriminate against Jackson in favor of Brownsville? In our opinion they do. This discrimination does not exist by virtue of the action of the Louisville & Nashville alone, but by reason of the united action of these different defendants. Without the consent of the lines north of the Ohio the discrimination would not exist, and it therefore lies within the power of those lines to stop it. If the Louisville & Nashville extended all the way from Brownsville to the delivering point, a different question would be presented. * * * we do not think that the fair intent of the act would permit the discrimination here existing in these rates between two localities but 25 miles apart, where the service for more than half the distance is by the same railroad. The Nashville, Chattanooga & St. Louis Railway extends from Jackson north to Paris, where it unites with the Louisville & Nashville. Cotton from Jackson passes 80 miles over the Nashville, Chattanooga & St. Louis and for the balance of the distance over the same line as that from Brownsville. Assume, now, that

> the Louisville & Nashville elected to maintain a rate of 70 cents from Brownsville, but the Nashville, Chattanooga & St. Louis, as the initial line, established a rate of 60 cents from Jackson. Could it be said that this road which hauls the traffic but 80 miles out of a total distance of 1,306 miles is entitled to create and perpetuate that rate condition? We think not. * * *.

In *Chamber of Commerce of Newport News* v. *S. Ry. Co.*, 23 I. C. C. 345, it was found that rates from southeastern freight association territory to Newport News were unduly prejudicial as compared with rates from the same points to Norfolk. The Commission said, at page 352:

> The Southern, Coast Line, Seaboard, and Norfolk & Western contend that their lines do not serve Newport News, and for that reason they can not be held responsible for any discrimination that may exist against Newport News. While it is true that none of their lines actually reaches Newport News, nevertheless, they all participate in Newport News traffic to and from the south by way of Norfolk or through connections with the Chesapeake & Ohio at Richmond.
>
> * * * * *
>
> The southern carriers participate actively in Newport News traffic to and from the south and southwest, and they practically control the rates between Newport News and points within association territories. The fact that their rails do not extend to Newport News can not relieve them from responsibility for the

effect of rates which they control and in which they participate. *R. R. Com. of Tenn.* v. *A. A. R. R. Co.*, 17 I. C. C. 418; *Indiana Steel & Wire Co.* v. *C., R. I. & P. Ry. Co.*, 16 I. C. C. 155; *Chamber of Commerce of Ashburn, Ga.*, v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140.

The Commission's order was upheld by the Commerce Court, *Southern Ry. Co.* v. *United States*, 204 Fed. 465.

It will be observed that each of these cases involved a situation where one or more carriers participated in transportation under one rate in the improper adjustment, but not in transportation under the other rate, and where one or more other carriers participated in the transportation under both rates. Other cases in which the Commission followed the same rule are very numerous and include the following:

Elk Cement & Lime Co. v. *B. & O. R. R. Co.*, 22 I. C. C. 84, 89.

Greenbaum Co. v. *C. & O. Ry. Co.*, 25 I. C. C. 352, 355.

Rates from Walsenberg Coal Field, 26 I. C. C. 85, 89.

Partridge & Sons Co. v. *P. R. R. Co.*, 26 I. C. C. 484, 486.

La Grange Chamber of Commerce v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178, 184.

Sheridan Chamber of Commerce v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250, 258.

Greenbaum Co. v. *L. & N. R. R. Co.*, 31 I. C. C. 699, 707.

Rates on Lumber from Southern Points, 34 I. C. C. 652, 671.

There is no support in *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, for appellee's contention that there can be no prejudice because the Fernwood & Gulf does not participate in transportation under the blanket rates. That case is essentially different from this case. There the facts were as follows: Joint through rates were published on forest products from points in the south to points north and east of Newark, N. J. Shipments moving under these rates passed over the lines of several different carriers. At certain points in the south, on the route of movement under these rates, the southern carriers granted a creosoting-in-transit privilege.[1] The Pennsylvania Railroad and the Jersey Central Railroad refused to grant a similar privilege at Newark. Upon a complaint naming the Pennsylvania, the Jersey Central, and certain other carriers as respondents, but failing to include as respondents the railroads which granted the transit privileges in the south, the Commission found that the failure to grant the privilege at Newark while it was being granted at the southern points constituted a prejudice against Newark.

This court held that the Commission's order was void, because a transit privilege is a matter local to

[1] The court described the privilege on page 254 as follows:

"By the privilege called creosoting in transit forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named."

the railroad on which the transit point is located, saying:

> * * * Under the rules of the Commission governing the making, filing, and publishing of tariffs, privileges like creosoting in transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. * * *

It follows that the Pennsylvania and the Jersey Central, which refused the privilege at Newark, were not responsible for the action of the southern carriers in granting the privilege at points on their lines and the southern lines were not accountable for the failure of the Pennsylvania and Jersey Central to grant the privilege at Newark.

A prejudice results from a relationship between two rates or practices. In the *Jersey Central case* no one carrier was in whole or in part responsible for both practices, the relationship of which was found by the Commission to result in prejudice.

In this case the prejudice results from the relationship between two rates, first, the blanket rate and, second, the rate from Knoxo. The Illinois Central and its northern connections participate in both of these rates.

The question here is whether the Fernwood & Gulf can, as a legal right, obstruct the Commission's

effort to remedy the prejudice, particularly when it can not show, as we will point out, that to do so would decrease its revenue or otherwise injuriously affect its interests.

As a matter of fact, the other carriers could, as before explained, comply with the Commission's order without the consent of the Fernwood & Gulf by raising the blanket rates to the level of the Knoxo rate, or by establishing proportional rates from Fernwood on lumber originating at Knoxo which, when added to the local rates of the Fernwood & Gulf, would produce combination through rates equal to the blanket rates. The consent, either voluntary or enforced, of the Fernwood & Gulf, would be necessary if the Commission's order were to be complied with by publishing joint rates from points on its line no higher than the blanket rates. Even if this last method were adopted, there is no reason to believe that the Fernwood & Gulf would receive less revenue than it obtains as its divisions of the existing joint rates. This would depend upon its divisions, of the new rates, which the Commission has the power to fix. In fixing those divisions, no doubt the Commission could consider that the blanket rates from Knoxo, lower than the rates which the Commission has found are not unreasonable, were primarily the result of the action of the Illinois Central and its northern connections in maintaining the blanket rates from other points.

We have tried to show that the *Jersey Central case* is not controlling here. In this connection, it is noteworthy that the court, in that case, referred with approval to *St. Louis-S. W. Ry. Co.* v. *United States*, 245 U. S. 136, the so-called *Paducah case*, which, in so far as it involved section 3, is almost exactly like the case at bar. There, an order of the Commission, based upon a finding that the lumber rates from the southwest to Paducah were unreasonable and unduly prejudicial as compared to the rates to Cairo, was under review. Paducah is situated on the south bank of the Ohio River, 42 miles above Cairo, Ill. Each city is a manufacturing and jobbing center for lumber and draws its lumber in part from the extensive region lying west of the Mississippi River and south of the Arkansas River, known as the "blanket territory." The principal railroads serving this blanket territory were the St. Louis-Southwestern, St. Louis, Iron Mountain & Southern, and Chicago, Rock Island & Pacific. The first two had their own lines from the blanket territory to Cairo and could reach Paducah only over a connecting line. The Rock Island reached both Cairo and Paducah only over a connecting line. The Rock Island had established a route via Memphis, but the other two companies had through routes to Paducah only via Cairo. From Cairo to Paducah transportation was over the Illinois Central. As to the Memphis route, transportation from Memphis was via the Illinois Central. The rate to Cairo was

16 cents, and the rate to Paducah via Cairo a combination rate made up of the 16-cent local rate to Cairo plus the 6-cent local rate from Cairo to Paducah. The Commission found that: 1. The 22-cent rate to Paducah was unreasonable in that it exceeded the existing rate to Cairo; 2. That the existing disparity of rates gave to Cairo an undue preference and advantage over Paducah; 3. That through routes and joint rates no higher than Cairo rates should be established to Paducah via either Memphis or Cairo.

The carrier connecting at Cairo (the Illinois Central) acquiesced in the order establishing the joint rate.

The court upheld the Commission's order and said at page 144:

> The carriers insist also, that the order is void on the ground that since their "rails do not reach Paducah they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reach Paducah, although not on their own rails, and thereby they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly, the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is

> not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra*, 162 U. S. 184.

The court said further at page 143:

> If these complaining carriers can not reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the act to regulate commerce, apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

It is true that in the *Paducah case* there was a finding of unreasonableness as well as a finding of prejudice, the court saying, at pages 144, 145:

> * * * the order in the case at bar is not merely one to prevent discrimination. * * * It is not primarily an order to remove discrimination in violation of section 3.

Nevertheless, the discussion in the opinion indicates clearly that the order was sustainable on grounds of discrimination, regardless of other grounds.

The case at bar is similar to the *Paducah case*. In this case the Illinois Central and its northern connections occupy the same position that the Iron Mountain, St. Louis-Southwestern, and the Rock Island occupied in the *Paducah case;* that is to say, they participate in two rates, the relationship of which is unlawful. And the Fernwood & Gulf in this case stands in the position of the Illinois Central

in the *Paducah case;* that is to say, it is a party to the transportation under one of the rates but not to transportation under the other. It participates in the transportation from Knoxo but not in the transportation from Fernwood, etc., as the Illinois Central participated in the transportation to Paducah but not in the transportation to Cairo. In the *Paducah case* the Illinois Central did not protest the order as the Fernwood & Gulf is protesting in this case, but the failure of the Illinois Central to protest could not empower the Commission to make a finding of prejudice if, as a matter of law, no prejudice existed.

Before leaving this question we should point out that if the Commission can not remedy a rate situation such as that here presented by a finding of prejudice under section 3, it can not satisfactorily reach it at all.

It may be suggested that the Commission has ample power to properly adjust the rates by findings of unreasonableness under section 1 and by fixing maximum or minimum rates or both. But such a course would present serious difficulties. The rate from Knoxo, standing by itself, is not unreasonably high or otherwise unlawful; the blanket rate, standing by itself, is not unreasonably low or otherwise unlawful. The real evil is the relationship between these rates, and the only way of striking *directly* at this relationship is by a finding of prejudice.

Would the Commission be justified in attempting to cure the evil *indirectly* by findings of unreason-

ableness? The distinction between a finding of unreasonableness and a finding of prejudice is of great practical importance, and this is at once manifest when we consider that the rule respecting reparation in the case of a finding of unreasonableness is different from that applicable in the case of a finding of prejudice.

A shipper who pays an unreasonable rate is entitled to recover the excess between that rate and a reasonable rate without further showing of damage. The fact that he may have passed on the damage to the purchasers of the goods or to others is immaterial. *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. On the other hand, the fact that a shipper has paid a rate which was unduly prejudicial to him when compared with the rate paid by another shipper, is not of itself sufficient to support an award of reparation. He is entitled to a recovery only if he can show actual pecuniary loss. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184.

In view of this distinction as to reparation, it would seem that the Commission should carefully avoid findings of unreasonableness when the real evil is merely a prejudicial rate adjustment. Complainant in this case showed no pecuniary loss as a result of the rate prejudice and reparation was accordingly denied. If the Commission had found the rate from Knoxo unreasonably high, complainant would have been entitled to reparation down to the basis of the rate found reasonable.

CONCLUSION.

The relative adjustment of rates is generally of greater importance to shippers than the level of rates. The chief purpose of the regulation of interstate carriers was to do away with discrimination between persons and places. Regulatory legislation was based on the theory that "the paramount evil chargeable against the operation of the transportation system of the United States" was such discrimination. In *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 356, speaking of section 3, this court said:

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.
>
> * * * * *
>
> It is apparent from the legislative history of the Act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory act or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it.
>
> "The provisions of the Bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now con-

ducted, is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations * * *." (Senate Report No. 46, 49th Cong., first sess., p. 215.)

The situation before the Commission presented a typical instance of discrimination between persons and localities. The evil could be directly remedied only by a finding of undue prejudice under section 3. It could not be satisfactorily remedied by findings of unreasonableness under section 1.

The Illinois Central and its northern connections participated in the transportation under both rates, the relationship of which was improper. The Fernwood & Gulf participated in the transportation under one rate but not under the other. This carrier should not be permitted to obstruct the removal of the maladjustment, particularly when it is not in a position to show that compliance with the Commission's order would reduce its revenue or otherwise injuriously affect its interests.

J. CARTER FORT,
Solicitor for the
Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

OCTOBER, 1923.

Appendix A.

State of Mississippi,
County of Marion:

For and in consideration of the sum of one dollar ($1.00), cash in hand paid, the receipt whereof is hereby acknowledged, and certain conditions as hereinafter recited, the Fernwood Lumber Company herein acting by and through the Secretary thereof, doth lease unto the Swift Lumber Company, their successors or assigns, for such a length of time as they continue the manufacture and shipping of lumber from their present mill site at Knoxo, Miss., or approximately seven (7) years, a right of way twenty-five (25) feet wide, being twelve and one-half (12½) feet on either side of the center of their logging railroad as now established, and to be established, by grade stakes on, over, and across the following lands in said County and State, more particularly described as follows:

Beginning on the SW. ¼ of NW. ¼, Section 18, Twp. 2, R. 12, where departure is made from the Fernwood & Gulf Railroad; thence in a southeasterly direction on, over, across said SW. ¼ of NW. ¼, SW. ¼, and S. ½ of SE. ¼, Section Eighteen (18), SW. ¼ of SW. ¼ and N. ½ of SE. ¼ of SW. ¼, Section Seventeen (17); SW. ¼ of SW. ¼, Section Sixteen (16); S. ½ of NE. ¼ and SE. ¼, Section Twenty-one (21), and NE. ¼, Section Twenty-eight (28), all in Twp. 2 N., R. 12 East, County and State aforesaid.

The conditions heretofore referred to are: That Swift Lumber Company, their successors or assigns, shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on or tributary to the logging railroad of the Swift

Lumber Company that may be offered and destined to a point beyond said logging railroad or any extensions thereof.

It is understood that the Fernwood Lumber Company hereby reserve the right for such crossings over the logging railroad of the Swift Lumber Company as they may require for their logging railroad, branches or spurs, and that the expense incident to installing these crossings shall be borne by the Swift Lumber Company.

It is also agreed that the Swift Lumber Company will provide at its own cost satisfactory crossings for all logging teams as well as turpentine teams at such points on its line as shall be designated by the Fernwood Lumber Company, or its Superintendents of its respective departments.

It is also agreed that the Swift Lumber Company will use every precaution against damage by fire to the naval stores and timber properties of the Fernwood Lumber Company and be liable for any damage traceable to their use of said right of way and save the Fernwood Lumber Company from loss or damage on account of acts of theirs or their employees.

In testimony whereof witness the signature of the Secretary of said Company, together with the seal of said Company hereto attached, this the 14th day of March, A. D. 1912.

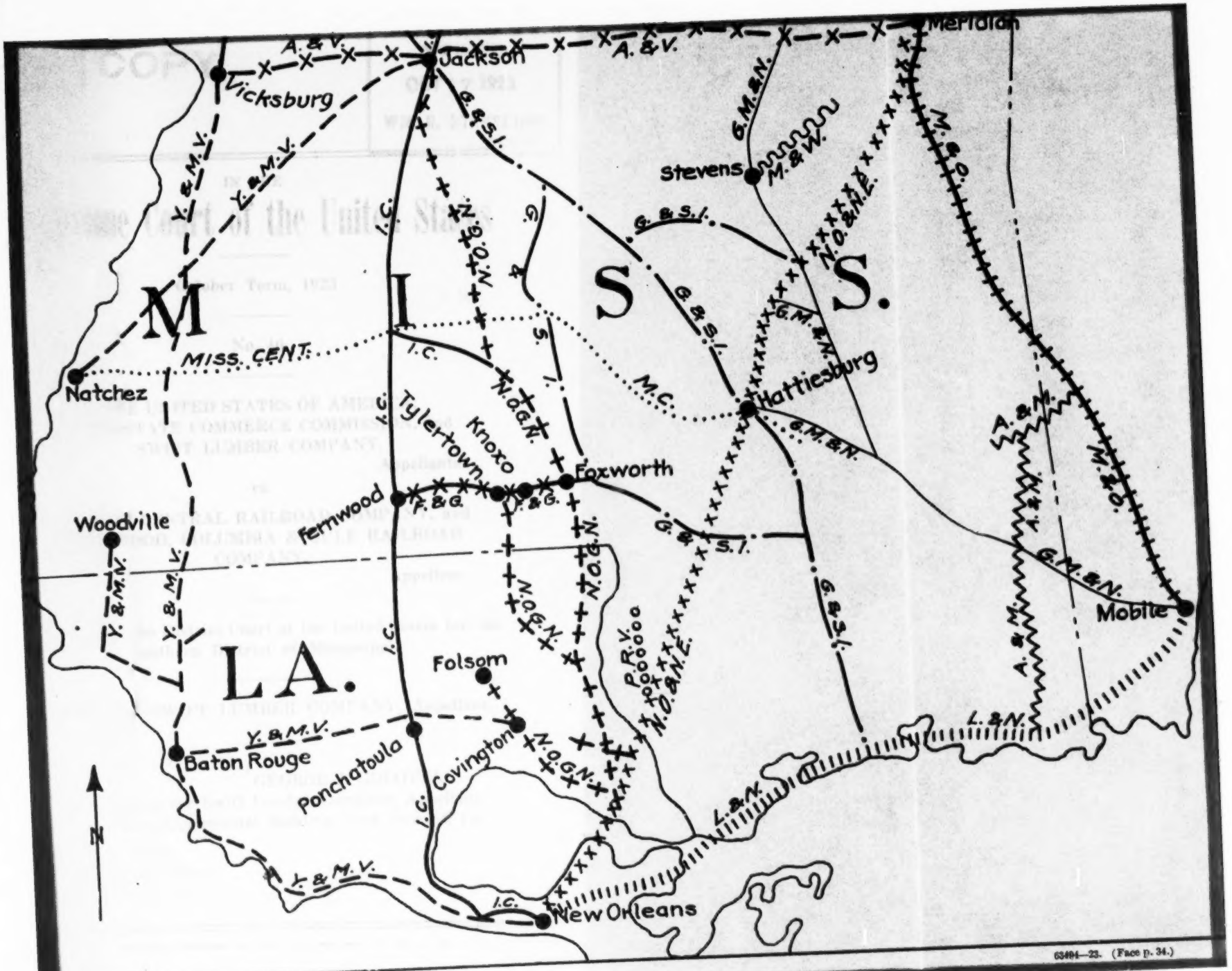
FERNWOOD LUMBER COMPANY,
——— ———, *Secretary.*

Accepted.

SWIFT LUMBER COMPANY,
By ——— ———.

(Interstate Commerce Commission. Docket No. 10827. Exhibit No. 8. Witness Kimball.)

○



63494—23. (Face p. 34.)

FILE COPY

Office Supreme Court, U. S.
FILED
OCT 17 1923
WM. R. STANSBURY

IN THE

Supreme Court of the United States

October Term, 1923

No. 40

**THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
SWIFT LUMBER COMPANY,
Appellants**

vs.

**ILLINOIS CENTRAL RAILROAD COMPANY, and
FERNWOOD, COLUMBIA & GULF RAILROAD
COMPANY,
Appellees**

Appeal from the District Court of the United States for the Southern District of Mississippi.

BRIEF FOR SWIFT LUMBER COMPANY, Appellant.

GEORGE J. GULOTTA,
Attorney for Swift Lumber Company, Appellant.
Canal-Commercial Building, New Orleans, La.

L. PALMER,
606 Commercial Place,
New Orleans, La.

FRANKLIN PRINTING CO., INC., 629 POYDRAS ST., N. O., LA.

INDEX

	Page
Statement of the Case	1 to 5
Assignment of Errors	3 to 5
First Proposition—Commission's Order Supported by Evidence and Findings	5
Second Proposition—Discrimination Irrespective of Discrimination Compared with Mississippi Central	7
Third Proposition—Discrimination Compared with Mississippi Central	10
Fourth Proposition—Mississippi Central Rates Not Forced by Competition	13
Fifth Proposition—Individual Rights of Fernwood, Columbia & Gulf Not Invaded	14
Sixth Proposition—Rates Prescribed Not Shown to Be Confiscatory	17
Seventh Proposition—Complainant Before Commission Not Estopped by Contract	19
Argument	20 to 34

INDEX (Continued)

AUTHORITIES CITED

	Page
Cent. R. R. of N. J. vs. United States, 257 U. S. 247	28
C. N. O. & T. P. Ry. vs. Int. Com. Com., 245 U. S. 136	30
E. Tenn. Va. & Ga. R. R. Co. vs. Int. Com. Com., 181 U. S. 1	26
Int. Com. Com. vs. Ala. Mid. Ry., 168 U. S. 144, 167	24-27
Int. Com. Com. vs. Diffenbaugh, 222 U. S. 42	27
Int. Com. Com. vs. Ill. Cent. R. R., 215 U. S. 242	20
Int. Com. Com. vs. Lou. & Nash. R. R., 227 U. S. 88, 91	21-30
Int. Com. Com. vs. Un. Pac. Ry., 222 U. S. 547	
Ill. Cent. R. R. vs. Int. Com. Com., 206 U. S. 441	21-30
Manufacturers' Ry. vs. United States, 246 U. S. 457	21-31-32
Philadelphia & Reading Ry. vs. United States, 240 U. S. 334	27
Procter & Gamble Co. vs. United States, 225 U. S. 282, 296	21
St. Louis S. W. Ry. vs. United States, 245 U. S. 136, 144	23-30
Tex. & Pac. Ry. vs. Int. Com. Com., 162 U. S. 197	27

IN THE

Supreme Court of the United States

October Term, 1923

No. 40

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
SWIFT LUMBER COMPANY,
Appellants

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, and
FERNWOOD, COLUMBIA & GULF RAILROAD
COMPANY,
Appellees

Appeal from the District Court of the United States for the Southern District of Mississippi.

BRIEF FOR SWIFT LUMBER COMPANY, Appellant.

STATEMENT OF THE CASE

(References are to pages of printed Record, except as otherwise stated)

This action was instituted in the District Court of the United States for the Southern District of Mississippi, Jackson Division, by the Illinois Central Railroad Company and the Fernwood, Columbia & Gulf (formerly Fernwood &

Gulf) Railroad Company, against the United States (Record, pp. 1-17), seeking to enjoin an order of the Interstate Commerce Commission, rendered in cause No. 10,827 of the docket of said Commission, in which the Swift Lumber Company was complainant and the two carriers named and a large number of other common carriers were defendants. By said order, and the findings made a part of same, the Commission found that the rates published and maintained by the defendants on lumber, carloads, from Knoxo, Miss., a station on the rails of said Fernwood, Columbia & Gulf Railroad, were unjustly discriminatory as compared with rates contemporaneously applying from a large territory of origin immediately surrounding said station of Knoxo, to a large extent of destination territory, comprising in the main points on and north of the Ohio and Potomac Rivers, and points opposite thereto east and west, besides certain points in Tennessee and Kentucky. By its said order, the Interstate Commerce Commission required the numerous carriers defendants before it to cease and desist from such discrimination, and to establish and maintain, from and after the effective date of said order, which was postponed from time to time to September 27, 1921, rates not in excess of those contemporaneously maintained from Fernwood and Tylertown, Miss., the junction points of said Fernwood, Columbia & Gulf Railroad with the Illinois Central Railroad and the New Orleans Great Northern Railroad, respectively (Record, pp. 154-158).

The Interstate Commerce Commission and the Swift Lumber Company duly intervened in said cause in the Court below as defendants, and this appellant moved to dismiss the complaint (Record, pp. 166-167), which motion was overruled on August 18, 1921, by the Court, composed of three judges as provided by law, who at the same time, on motion of plaintiffs, granted a decree temporarily restrain-

ing the said order of the Commission during the pendency of the action (Record, pp. 167-168). The Swift Lumber Company filed its answer as intervenor November 16, 1921 (Record, pp. 170-178), and on February 10, 1922, the District Court, on final hearing, rendered a decree making such injunction perpetual (Record, p. 180). Thereupon, the United States, as original defendant, and the Interstate Commerce Commission and the Swift Lumber Company as intervenors, filed their joint petition for appeal to the Supreme Court (Record, p. 181), which was duly allowed by the judges presiding on the final hearing of said cause (Record, p. 183), and bring the cause to this Court for review upon their joint assignment of errors filed in the Court below, setting out that said Court erred in its findings and decree in the following respects (Record, pp. 181-182):

The District Court erred:

I. In granting the motion for preliminary injunction enjoining the order of the Interstate Commerce Commission entered April 5, 1921, and suspending the force and effect of the same, and in not denying the motion.

II. In overruling the motion of the United States to dismiss the petition and in not sustaining the motion.

III. In disallowing and overruling the motion of the Interstate Commerce Commission to dismiss the petition, and in not sustaining the motion.

IV. In dismissing the intervention of the Swift Lumber Company at the cost of the Company.

V. In entering the following order:

"It is hereby ordered, adjudged and decreed that the United States, its agents, employes and attorneys be, and they are hereby perpetually

enjoined and restrained from enforcing, or attempting to enforce, that certain order made by the Interstate Commerce Commission of the United States in that certain cause before said Commission lately pending, styled 'Swift Lumber Company vs. Fernwood, Columbia & Gulf Railroad Company et al.,' Number 10,827 upon its docket, wherein a final order was entered of date of April 5, 1921, whose effective date was from time to time postponed, and that all persons be, and they are hereby enjoined from in any way attempting to enforce or assert any right or title under said order of said Interstate Commerce Commission in said cause made, and that the same be hereby ordered and adjudged to be null and void and without any force or effect, and to that end perpetual injunction shall issue."

VI. In not finding and holding that the Interstate Commerce Commission on the record of the evidence and proceedings before it had the power and authority to make and enter the order; that the order rested on substantial evidence, and that the questions sought to be raised by the bill of complaint were foreclosed by the findings of fact.

VII. In not dissolving the preliminary injunction and dismissing the bill of complaint for want of equity on the final hearing.

Supplementing the foregoing formal outline of the proceedings and record in the Court below, this appellant, in order to avoid undue repetition, refers to and adopts, and asks to be consiered as a part hereof, the further particulars contained in the briefs of its co-appellants, the United States and the Interstate Commerce Commission; and it further refers to and asks to be considered as supplementary to and a part of this statement the several citations

of the record setting forth the proceedings in the Court below and before the Interstate Commerce Commission, appearing in the succeeding portions of this brief, bearing upon the various phases of the case therein discussed.

As the errors assigned, as above quoted, all go to the substantial question at issue, that the Interstate Commerce Commission, on the record of the evidence and proceedings before it, had the power and authority to make and enter the order; that the order rested on substantial evidence, and that the questions sought to be raised were foreclosed by the findings of fact, it is conceived that they may be considered as a whole, and to that end this appellant respectfully submits the following propositions as covering the material questions at issue in this appeal:

FIRST PROPOSITION

The order of the Interstate Commerce Commission was sufficiently supported by the evidence adduced before it and exhibits filed on the hearing of the case, and by the findings of fact made by the Commission in the just and proper exercise of its discretion, based upon such evidence and exhibits.

Manifestly, it is impracticable, within the limits of this brief, to review the findings of the Commission and point out in detail the evidence in the record supporting them; nor do we understand that this is necessary or desirable. It will be sufficient to point out the findings of fact made by the Commission, all of which are amply sustained by the evidence adduced at the hearing, and for practical purposes this may be done by quoting the following from the opinion rendered by the Commission, which appears on page 488 of volume 61 of the Commission's reports (Record, pp. 147-148):

"Practically all of the yellow-pine production on the Illinois Central and the affiliated Yazoo & Mississippi Valley is in the territory south of the line of the Alabama & Vicksburg, and from all points in this territory, both on their main lines and on their branch lines, the Illinois Central and Yazoo & Mississippi Valley blanket their rates on yellow-pine lumber and its products to Ohio River crossings and points taking the same rates; to the territory beyond the Ohio River crossings, including eastern and Virginia cities; and to points in Kentucky and Tennessee on their own lines and on the lines of certain other carriers. Points on the main line and branch lines of the New Orleans Great Northern are similarly blanketed.

"The Fernwood & Gulf is well within this blanket territory and nearer to the northern boundary line than to the southern. The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of New Orleans, on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch, but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the line of the former at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distance to Memphis, Tenn., through which point most of the traffic with which we are concerned moves, are 115 miles greater by way of Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the

New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown and 96 miles greater by way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory."

There were minor factors of the situation, but outside of the existence of the rates in controversy, which are not questioned, the foregoing sums up the essential features of the rate adjustment under consideration by the Commission.

SECOND PROPOSITION.

Even if it be held that the rates complained of before the Commission, against which its order at issue herein was directed, were improperly held to be discriminatory as compared with those contemparaneously published and maintained from points on the Mississippi Central Railroad to the same destinations, the findings and order of the Commission were amply sustained by evidence of discrimination in other respects.

Complainants in the Court below, in paragraph XIX of their bill of complaint, allege that the only discrimination which is even suggested as ground for making the order complained of grows out of the fact that the Illinois Central extends the junction point rates to points on the Mississippi Central Railroad, and participating in through group rates from certain other small railroads named (Record, p. 14). That this conclusion is not borne out by the findings of the Commission appear from the fact that its opinion does not purport to base its conclusions pri-

marily, or even in part, upon the extension of the group rates to points on such roads, and mentions them only on page 487 of its opinion (Record, p. 147) in connection with the allegations and contentions of this intervenor as to such rates, and the contentions of the carriers in regard thereto, including the argument that plaintiffs below were compelled by competition to participate in such group rates from points on the Mississippi Central, and had no control over the rates from the other short line roads named. On the contrary, the issue as analyzed by the Commission, based upon the facts found by it, as recited under the first proposition, **supra**, is thus stated and commented upon in its opinion; page 490, (Record, p. 149):

> "The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other indepentent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefits to these other short-line points and specifically in this case, to Knoxo, on the line of the Fernwood & Gulf."

It will be observed that the dominant factor of the situation as viewed by the Commission was the equalization of rates on lumber from points located within "a producing territory of wide extent," as described in its findings of fact above quoted. This analysis embodies features of dis-

crimination against this intervenor in the following respects:

1. Primarily and most important, the blanket rates ignored differences in the length of haul, and the consequent cost of service, to the extent of 200 miles or more, as compared with the assessment of an additional rate for the haul of 27 miles from Knoxo to Fernwood, and of seven miles from Knoxo to Tylertown.

2. The application of the blanket rate to branch line points ignored the addition to cost of service due to its interruption by transfer to the main line, which is closely comparable to the transfer from the Fernwood & Gulf to its connections, which is the only physical element of additional cost necessitated by a shipment from a point on the Fernwood & Gulf, as against one from a point on the Illinois Central or New Orleans Great Northern main line.

3. Extension by the Illinois Central of the group rates, not to the Mississippi Central alone, but to a number of other connections which originated the traffic, such as the Louisiana Railway & Navigation Company, the New Orleans Great Northern, and the Gulf & Ship Island, distinguishable from the Fernwood & Gulf only by their mileage and the amount of business they originate, an utterly defenseless test on which to predicate a distinction in rates. The wide extent to which the Illinois Central had extended the group rates beyond its own rails places the case on a different footing from that of one involving discrimination between two specific connections, and embodies in substance the same principle as the blanket adjustment itself. Supplemetary to this is:

4. Participation by the Illinois Central at junctions within producing territory in blanket rates from "short

line" points through the intervention of other carriers, e. g., from points on the Alabama & Mississippi and the Mississippi Western via the Gulf Mobile & Northern and Ackerman, Miss.

That all these points were considered by the Commission and decided adversely to the carriers in a manner clearly and properly within its discretion, is evidenced by the following further quotation of its opinion, on page 490, following that last above quoted (Record, p. 149-150):

> "Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense, but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.

THIRD PROPOSITION

The findings and order of the Commission were justified on the sole ground of discrimination in comparison with rates contemporaneously maintained from points on the Mississippi Central Railroad, by reason of the fact that plaintiffs herein and other carriers participating in the rates complained of from Knoxo were refusing to give effect to the natural competitive conditions obtaining at

Knoxo, while at the same time giving effect to similar competitive conditions obtaining at points on the Mississippi Central; and the findings of the Commission are therefore justified notwithstanding a greater degree of competition existed from the latter points.

Under the first and second propositions above, it is evident that the real basis of the decision of the Commission was the widespread application of the group rates from the large territory immediately surrounding Knoxo, of which their application from points on the Mississippi Central was only a part, instead of being, as virtually contended by appellees, the sole ground of the decision. Whatever virtue there might be in the contention that a comparison with rates from Mississipi Central points alone being compelled by competition, and therefore not furnishing a lawful test, it certainly offers no objection to the consideration of such rates as a single factor going with many others to form a situation which on the whole resulted in undue discrimination.

In this view of the case the justification of the rates from the Mississippi Central on the ground of competition becomes immaterial, but in view of the emphasis laid upon the point by the complainants below, it is well to point out that even their contention on that point is not supported by the record. It must be borne in mind that the complaint before the Commission was not directed against the Fernwood & Gulf and its immediate connections only, but against a large number of other carriers, of whom it is sufficient for present purposes to mention only the Alabama & Vicksburg Railway Company, Mobile & Ohio Railroad Company, Missouri Pacific Railroad Company, Alabama Great Southern Railroad Company and New Orleans & Northeastern Railroad Company. As will be seen from

the map offered in evidence by complainant before the Commission as it Exhibit No. 4 (Original Record, p. 325), the Illinois Central on the west, and the New Orleans Great Northern on the east, connect with the parallel lines of the Fernwood, Columbia & Gulf and the Mississippi Central, the New Orleans Great Northern extending to Jackson, Miss., where it connects with the Alabama & Vicksburg, extending east to a connection with the Mobile & Ohio and Alabama Great Southern at Meridian, Miss., and west to a connection with the Missouri Pacific at Vicksburg, Miss., providing outlets to consuming markets independent of the Iillnois Central. It will therefore be observed that traffic from the Fernwood, Columbia & Gulf is essentially competitive as between the Illinois Central on the west and the New Orleans Great Northern and its connections on the east, and not to be distinguished from that originating on the Mississippi Central. It is respectfully submitted that an absolute justification in law for discrimination can be predicated only upon the existence of competition in the one case which is entirely lacking in the other. It is true that in the case of the Mississippi Central the competition is greater in degree, owing to the fact that that road has another connection with the New Orleans & Northeastern at Hattiesburg; but something more is required to remove the question from the discretion of the Commission. The starting point of this aspect of the case is the unquestioned existence of discrimination, and while the Commission might perhaps hold that it was justified by a greater degree of competition in one case than in the other, it is equally true that its opposite finding is a lawful exercise of its discretion, with which the courts will not interfere.

FOURTH PROPOSITION.

The record before the Commission does not support the contention of the Illinois Central Railroad that its extension of the group rates to points on the Mississippi Central was forced by the prior action of other carrier connecting with such railroad; but it does show that at the time it put such rates into effect it was pursuing the policy of exending such group rates to points on other so-called short lines similar to the Mississippi Central and Fernwood, Columbia & Gulf.

Practically the only justification offered by the appellees for their refusal to accord group rates to points on the Fernwood & Gulf, while extending them to points on the Mississippi Central, is that they were forced to extend such rates to the latter road by the prior action of the New Orleans & Northeastern. (Testimony of Sheppard, Record p.p. 82-83). Apparently the impression is sought to be conveyed that they would otherwise have made rates from that road on an arbitrary basis, although it, like the Fernwood, Columbia & Gulf, is controlled by lumber interests, and as shown an page 16 of the evidence before the Commission, (Record, p.p. 41-42), these interests have mills located at local points. It is conceived that in view of the present situation of discrimination arising from recognizing competition in one case and ignoring it in the other, neither the Commission nor the courts are called upon to revert to ancient history to determine the responsibility for extending the group rates to the Mississippi Central, and whether it was voluntary or compelled on the part of the appellees. It is true the original connection of the Mississippi Central was with the New Orleans, but this lacks much of meaning compulsion, of the kind amounting to justification, and to hold it so would

mean entering the realm of speculation to find an excuse for voiding the Commission's order. As a matter of fact, it appears from the record before the Commission that at the time connection was made between the Illinois Central, and the Mississippi Central the former road was following the practice common in those days of extending special concessions to sawmill owners of small railroads. As shown by Exhibit No. 6, offered by this intervenor at the hearing before the Commission"s examiner, (Record, p. p. 45-46), the Illinois Central was at that time applying the group rates on lumber from Fernwood, applicable only on lumber manufactured from logs brought into Fernwood from stations on the Fernwood & Gulf road, including the transportation of the logs to Fernwood, for which the Fernwod & Gulf was allowed a division out of the Fernwood rate. Under these circumstances, to place the sole responsibility for the Mississippi Central adjustment on the New Orleans & Northeastern would be a most violent presumption, and the past history of the rates only tends to emphasize the correctness of the Commission's findings on the true issue, so far as this aspect is concerned, which as stated under the third proposition above, was whether, considered as of the present, the difference in treatment of the two roads was justified by mere difference in degree of competition.

FIFTH PROPOSITION.

The findings and order of the Commission do not violate any inherent right in the Fernwood, Columbia & Gulf Railroad to maintain such basis of rates on lumber from its local points as it may deem proper, and the finding of discrimination on the part of its connections participated in by it, is justified by the practical aspect of the question, which is that the extension of group rates to short line rail-

roads is within the discretion and control of the trunk line carriers, rather than that of the short line road itself. In sections XV and XXII of their bill of complaint, appellees assign as basis of their attack upon the order of the Commission in controversy herein, the fact that the traffic in question is not accessible to any other rails than those of the Fernwood Company; and there is much said in the bill of the alleged right of that carrier to the individualization of its own rates. As understood, this is in effect a contention that the finding of discrimination by the Commission was unwarranted because the act of discrimination could not be brought home to the Fernwood, Columbia & Gulf Railroad because it did not participate in the rates in comparison with which the discrimination was found to exist, and virtually the volume of the rate from its stations was a matter properly coming within its own individual discretion.

It is respectfully submitted that the latter contention constitutes an unwarranted arrogation of power to the originating line, and that in spite of the various protests in the bill of complaint against the alleged effort of the Commission to co-ordinate its rates with those from points on other roads in the same territory, the right of independent action by the individual carrier is subordinate to the right of the public to a well ordered and consistent rate adjustment in harmony with the general basis of rates in effect in the adjacent territory subject to the same conditions, and to the power of the Commission to require such an adjustment. It is difficult to perceive the sacredness of a policy of "individualization" which contemplates that shippers on its line shall be placed at a material rate disadvantage as compared with their competitors entirely surrounding them in a large territory, which is exactly what this claimed "individual policy," stripped of all its

beclouding verbiage, really means; and especially is this true when it is considered that the shipper here in question is a competitor of the lumber interests which control the originating road.

Further, however, it is submitted that the Fernwood, Columbia & Gulf is not the sole arbiter of the rate structure which shall obtain on traffic originated by it. There is no dividing line between its claimed right to plus the rates from its line and the right to dictate the entire through rate, which is manifestly the act of all the carriers participating therein, all of whom were made parties before the Commission, although for present purposes we need only consider those heretofore mentioned. Not merely the fixing of the through rate, but the fixing of the relation of the rate with those from other points in the group can be considered in no other way than as the joint act of the originating road and its connections; and if the theory of the appellees be conceded it means that the Commission is without power, merely because the short line originating road happens to be a different one in every case, to require any consistency between rates in immediately contiguous territory. The question is purely a practical one for the Commission, and the view of the latter regarding it is clearly indicated by the expressions used in its opinion as above quoted, i. e.,

> "The fundamental issue is whether carriers which **have equalized rates** on lumber to certain destination from all their main-line and branch-line points, **and from points on certain independent short lines** as well, may, without being guilty of undue prejudice refuse to **extend** similar blanket rates to producing points wtihin such territory which are located on other independent short lines."

The use of the word "extend" is significant, and conveys the Commission's recognition of the well-known traffic principle that the application of group rates from short line originating roads is a matter primarily for determination by their trunk line connections, rather than by the short line roads themselves. Certainly the Illinois Central, for example, can not escape the charge of discrimination until it has gone as far to establish group rates on the Fernwood, Columbia & Gulf as it has to establish them on the Mississippi Central, i. e., by allowing it a division of 6 cents per 100 pounds (Record 117), and certainly it is not to be assumed that the Fernwood, Columbia & Gulf would insist upon its "policy of individualization" in such an event. The Commission has reached the real heart of the matter by finding that the connections of the Fernwood, Columbia & Gulf have subjected the complainant before it to undue prejudice, which is a substantial thing, while the theory that it is estopped from condemning this prejudice merely because the Fernwood, Columbia & Gulf is not a party to the rates with which its own are compared is but a shadowy thing, and the order to remove the discrimination properly runs against it by reason of its acquiescence in the discrimination.

SIXTH PROPOSITION.

The contention of the Fernwood, Columbia & Gulf Railroad that the rates prescribed by the Commission in its order are unremunerative is not supported by the evidence before the Commission, and it has wholly failed, both before the Commission and in the Court below, to adduce the necessary evidence to establish this fact, and to sustain its claimed right to a return which will provide for a retirement reserve to amortize its investment.

Whatever merit there may be in this contention of the appellees, it is respectfully submitted that it is one as to which the burden of proof is upon them, and they have entirely failed to meet it. In this connection the peculiar situation of the Fernwood & Gulf road must be considered, it appearing from the record before the Commission that it was originally built as the logging railroad of the Fernwood Lumber Company, and (Record, page 124) 85 per cent of its present traffic consists of the log movement of that company. In the entire absence of any evidence, either before the Commission or before the court below, of the charges fixed by the closely connected owners of the railroad and the lumber company to be paid by the latter for the transportation of its logs, or of the amortization charged off by the lumber company in fixing the consideration to be paid by the railroad company on acquiring ownership of the road, any finding by this Court that the rate prescribed by the Commission would be confiscatory must necessarily be based upon mere presumption, and a totally unwarranted substitution of the opinion of the Court for that of the Commission.

As far as the Fernwood & Gulf is concerned the Commission in its opinion, (Record, p. 148), points out that its opinion in the Tap Line case justifies an allowance of 5 cents per 100 pounds to it, which is more than it is receiving, and notwithstanding the broad general statement of the witness Sheppard (Record p. 110), that his road could not afford to allow a greater shrinkage, we submit that the record is absolutely barren of any evidence on this score that would even remotely call for setting aside the findings made by the Commission.

SEVENTH PROPOSITION.

Complainant before the Commission was not estopped by contract from objecting to the rates there complained of.

The emphasis laid upon the theory that the Swift Lumber Company was estopped by contract from maintaining its complaint before the Commission seems to call for some notice of the point here, extraordinary as it may seem from a legal standpoint. It is not our purpose, however to call to attention the obvious fallacy of the contention that either the shipper or the carrier may be bound by a permanent agreement as to rates, but we shall content ourselves with referring to the purported contract itself. This contention has reference to Exhibit No. 8 identified at the hearing by the witness Kimball (Record p. 56), which was a contract whereby the Swift Lumber Company acquired a right of way for its logging railroad over the lands of the Fernwood Lumber Company. We invite the court to carefully scrutinize this contract, (orginal Record, p. 331), and confidently challenge appellees to point out that it anywhere purports to obligate the Swift Lumber Company to pay for the transporation of the lumber manufactured by it any particular rates or basis of rates, or even mentions the shipment of such lumber at all. All that it does provide, relating in any way to traffic, is that the Swift Lumber Company shall deliver to the Fernwood & Gulf road for transportation any goods offered to it by third persons destined to points beyond it own line. In other words, it contemplates that the Swift logging road may develop a certain amount of general traffic incident to its primary function of hauling logs; and while the provision was in fact superfluous, inasmuch as it reached no other rails than those of the Fernwood & Gulf, it was apparently de-

signed to secure the traffic to the latter road in case the logging road were at some future time extended to a connection with another railroad.

ARGUMENT.

The Swift Lumber Company conceives that, considering its status as intervenor, it may appropriately direct its discussion of the case more particularly to the facts involved than to any extended analysis of the law applicable thereto. Hence, while some reference to decided cases is necessary to explain our conception of the materiality of the facts shown by the record, apparently our purpose may be best served by treating the former in a broad way and without going into any great detail.

The legal status of orders of the Interstate Commerce Commission under the interstate commerce act, especially as amended by the Hepburn act of 1906, is too well established to need any extended comment, but as a premise to this argument, we may cite one analysis of it by this Court, as embodied in the case of **Interstate Commission vs. Illinois Central R. R. Co.**, 215 U. S. 452, decided in 1919, in which after calling attention to the greater effect given to the Commission's orders by the amendment of 1906, it is said, on pages 469 **et seq**:

> "Beyond controversy in determining whether an order of the commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or law, (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made, and (c), a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form

> within the delegated power, nevertheless it must be treated as not embraced therein because the exertion of authority thus questioned has been manifested in such an unreasanable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. (Postal Telegraph Co. vs. Adams, 155 U. S. 688, 698). Plain as it is that the powers just stated are of the essence of judicial authority, and which therefore may not be curtailed and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order under our suspicion as to whether the administrative power has been wisely exercised."

To substantially the same effect are the pronouncements of this Court in the following cases:

Illinois Central R. R. Co. vs. Interstate Commerce Commission, 206 U. S. 441.

Proctor & Gamble Co. vs. United States, 225 U. S. 282, 296.

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 91.

Manufacturers' R'y vs. United States, 246 U. S. 457, 481, wherein the Court said regarding discrimination:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of these questions of fact that have been confided by congress to the judgment and discrimination of the Commission. **I. C. C. vs. Ala Mid. R'y, 168 U. S. 144, 168, 170;** and upon which its decisions made

> the basis of administrative orders operating in futuro are not to be disturbed by the courts, except upon a showing that they are unsupported by the evidence, are made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

Under our first proposition above, we have analyzed the essential facts disclosed by the record before the Interstate Commerce Commission, and found by it, sufficiently, we believe, to show that the issues before the Commission, and decided by it, were well within the scope of its power, and its findings and conclusions thereon were amply supported by the evidence adduced before it. Any addition to this analysis, short of a review of the entire record, seems superfluous at this point, and we shall content ourselves by referring to such analysis and inviting the careful scrutiny by the Court of the entire record before the Commission, which we confidently submit will disclose no foundation whatever in the substantial and broad aspects of the case for the attacks made upon it, especially in subdivisions 3, 7 and 8 of paragraph IV of the bill of complaint herein.

It follows that the issue herein turns upon the specific grounds alleged against the Commission's order in the bill of complaint, of which apparently that most relied upon and most strongly urged is that there was no evidence to support the finding of discrimination, and particularly in this connection that such apparent discrimination as existed was that appearing from a comparison with other rates, which were compelled by competition, as set forth in paragraph XIX of the bill of complaint. An examination of this paragraph discloses that it is an effort to justify the difference in rates solely from the standpoint of the two

complainants, and ignores the true status of the question as set out under the second proposition above. These two carriers were not the only defendants before the Commission, this intervenor's complaint being directed against numerous other carriers, particularly those within the orginating territory described; who had established the system of rates on lumber therein described, uniform so far as points of origin are concerned, the existence of which, as shown by the quotation above from the Commission's opinion, formed the principal basis for the finding of discrimination. It need not be inquired how this uniform system of rates was established, and while perhaps it was not the result of specific agreement, the uniformity itself argues that it necessarily grew out of an understanding reached in some way, as the great majority of such rate adjustments properly and necessarily do. The opinion of the Commission leaves no room for doubt that it is primarily upon the existence of this uniform, or "blanket" adjustment that it has reached its conclusions as to the duty of such carriers to this intervenor, located upon a small railroad within the blanket. The property of this action and the power of the Commission to make this finding is clearly stated in the case of **St. Louis Southwestern R'y Co. vs. United States**, 245 U. S. 136, 144, where it is said:

> "Localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it."

From this point of view it is plain that the question whether the unquestioned discrimination against this in-

tervenor and its shipping point, Knoxo, was undue, was clearly within the discretion of the Commission, whose finding thereon was amply supported by the evidence, and so far from being subject to review, it is difficult to see how it could have found otherwise, especially in view of the fact that this blanket adjustment involved numerous cases of the participation of an originating line prior to the trunk line which transported the lumber out of the producing region, and the further fact that Knoxo is itself naturally competitive. And this is true not only considering all the defendant carriers in the producing region together, but even as to the Illinois Central considered alone, whose sole justification of its treatment of rates from local points on the Fernwood, Columbia & Gulf is based upon its so-called consistent policy of confining the group rates to points on its own line, except where compelled by competition to do otherwise. It is true this Court has held that compelling competition may excuse discrimination, but on the other hand it is not all competition which may serve as such a valid excuse, and its force is peculiarly a question for the Commission, in view of all the facts. **Interstate Commerce Commission vs. Alabama Midland Ry.** 168 U. S. 144, 167.

As concerns the Illinois Central, a significant circumstance appearing from the record is the status of its so-called "consistent policy" of limiting the group rates. Whatever merit there may be in this contention as regards justifying an exception to such a policy on the ground of competition it is conceived that there is a limit at which it loses its force, and this limit has long since been passed in respect of the rates in question. As appears from the record, the Illinois Central has extended the group rates beyond its own line, and applies them from mills on the New Orleans Great Northern, Louisi-

ana Railway & Navigation Company, Gulf, Mobile & Northern, Gulf & Ship Island, Mississippi & Western, Alabama & Mississippi and Mississippi Eastern, embracing a total of 190 sawmills not reached by its own rails, as compared with 89 mills on its own lines, including the Yazoo & Mississippi Valley, and a bare three or four on its short line connections taking arbitraries higher. (See Exhibit No. 5, Record, p. 44, and original Record, p. ?—not indexed.) In other words, while in the beginning extension of the group rates beyond its own line might have been justified as an exception to its policy, on the ground of competition, the exception has now become the rule, and the original rule has become the exception. Certainly under these circumstances the presumption that the resulting discrimination against intrvenor is undue attaches with much greater force and calls for materially more convincing justification than is to be found in a "consistent policy" which has dwindled down to such an insignificant remnant.

It must be plain from the foregoing, and from the record, that this case presents a question of discrimination whose justification or condemnation was entirely within the discretion of the Commission, fully "within its delegated power," and wholly free from any possible criticism that its authority has been exerted "in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power." It is true this Court has condemned certain orders of the Commission on the ground that it has misconceived what properly constitutes discrimination, or what competition or other consideration justifies it; but these decisions have been based upon practical questions calling for the exercise of judicial power and the application of legal princi-

ples thereto, and we confidently assert that none of them afford a reasonable ground for criticizing the conclusions reached in this case. In support of this contention it may be proper to briefly review a few of the principal decisions of this kind rendered by this Court, and contrast them with the questions in the present case:

In the case of **East Tennessee, Virginia & Georgia R. R. Co. vs. Interstate Commerce Commission, 181 U. S. 1,** this Court held that the defendant carriers were justified by competition of carriers operating through Cincinnati in maintaing lower rates to Nashville than to the intermediate station of Chattanooga, basing this conclusion on the practical consideration that the competition through Cincinnati was compelling, and created the disadvantage against Chattanooga, irrespective of whether or not the defendants met the competition at Nashville. In this, however, the Court followed specific findings of the Commission, and the principal point decided was that the Commission erred in holding that the discrimination against Chattanooga was not, as a matter of law, justified by any competition of carriers subject to the act to regulate commerce, and in therefore declining to base its conclusions upon the facts found by it. In comparison with the case at bar it is pertinent to point out that the case cited involved a conflict between two independent systems of rates, one called the Northern adjustment, and one the Southern adjustment, which met at Nashville, resulting in a disparity. In the present case we are dealing with a single rate adjustment, and the issue is whether an exception to it is justified; and while the question of competition enters more or less into both cases, the significance of such competition depends upon entirely different considerations, as is plainly manifest from the Commission's

analysis of the fundamental issue in this case, quoted under our second proposition.

The question decided in **Interstate Commerce Commission vs. Alabama Midland R'y, 168 U. S. 144,** was practically the same as in the case last cited, i. e., that the Commission erred in holding that competition could not be considered as justification for discrimination in the absence of prior application for relief from the fourth section, prior to the 1910 ammendment of the fourth section; while in **Texas & Pacific R'y vs. Interstate Commerce Commission, 162 U. S. 197,** a similar holding by the Commission as to the distinction between import and domestic traffic was condemned. In both these cases, however, the power of the Commission to review the act of the carriers in giving effect to these considerations in their tariffs is distinctly upheld.

In **Interstate Commerce Commission vs. Diffenbaugh,** 222 U. S. 42, it was held that the Chicago, Burlington & Quincy Railroad did not unduly discriminate against Mississippi river points by refusing elevator allowances on grain at such points, while making them at Missouri river points in competition with the Union Pacific, which made the allowances nowhere else. While this is clear as to the principle that competition may justify discrimination, its application to the very simple facts involved furnishes no argument whatever for questioning the correctness of the Commission's findings on a state of facts so materially different as in the present case. Indeed, all the elements on which the Commission based its conclusions in this case are conspicuously lacking in the case mentioned.

The case of **Philadelphia & Reading R'y vs. United States, 240 U. S. 334,** is even less persuasive, and apart from the mere fact that it condemns the Commission's

finding of discrimination, has no apparent bearing on the case before the Court. It merely holds that Jersey City, against which discrimination was not alleged, was not discriminated against, as held by the Commission, merely because rates thereto from Evansville and other producing points were not the same on cement, while uniform rates applied from Evansville and competing producing points to other destinations. In that case the Commission declined to find that rates from Evansville to Jersey City were unreasonable, or discriminatory as compared with rates from other producing points to Jersey City or from Evansville to other destinations; and this Court virtually held that the rates having been justified by the Commission in such respects, could not properly be condemned on the grounds assigned.

In **Central R. R. of New Jersey vs. United States, 257 U. S., 247,** this Court condemned a finding of discrimination by the Commission against appellant in a manner which likewise has no bearing whatever in the instant case. Briefly stated, it was held that the Commission erred in holding that the Central of New Jersey was guilty of discrimination in not according creosoting in transit privileges on lumber at points on its rails, while participating in through rates on lumber which had been granted such privilege by Southern carriers. It is pertinent to point out the distinction that so far from the issue herein being one of the act of one carrier as compared with another, all the defendant carriers bear the same relation toward the rates complained of as to those in comparison with which discrimination was found, and there is an utter lack of analogy between the circumstances of the two cases. The Court in the case cited bases its decision on the very practical view that the Central of New Jersey had no control what-

ever over the granting of the transit privilege by its prior connections, had no possible interest in it, and was not affected by it in any way, the matter being entirely within the control of the carrier on whose line it was granted, which carrier assumed all the expense and collected the charge therefor. In its proper meaning, this view only confirms the point made above, that the present case is logically to be judged in its practical aspects, which we have endeavored herein to analyze, and which the Commission has duly found in the legitimate exercise of its discretion.

In the four cases last cited it is evident that the Court considered the authority of the Commission to have been exerted "in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power," but we feel convinced that the findings of the Commission in the case before the Court can not be questioned on that ground. There is certainly nothing shadowy or vague about the appellants having "equalized rates on lumber to certain destinations from all their main-line and branch-line points as well, which are located within a producing territory of wide extent," involving hauls longer and more expensive than from Knoxo, and involving numerous instances of the participation of prior carriers, nor in the resulting disadvantage to Knoxo. The conclusion is inevitable that the wide extension of the group rates to points not on the trunk lines reaching to destination territory, and the ignoring of potential competition at Knoxo, present a decidedly substantial question as to justification on the ground of competition. The only shadowy feature of the case visible to us is the contention of appellants, which reduced to its lowest terms amounts to the tenuous syllogism that discrimination may

be justified by competition, and rates from the Mississippi Central have been forced by competition.

We submit with confidence that the record before the Court affords no ground for condemning the order of the Commission, except by "setting aside a lawful administrative order under our suspicion as to whether the administrative power has been wisely exercised," which the Court will not do, as said in **Illinois Central R. R. vs. United States, supra.** On the contrary we can but feel that the Court will be impressed with the wisdom of the Commission's findings as a whole, even though some of the numerous considerations involved may not meet with its entire approval. **Interstate Commerce Commission vs. Louisville & Nashville Railroad, 227 U. S. 88.** The case just cited and those mentioned immediately below are cases involving discrimination in which the decision of the Commission was approved by this Court, and the facts involved present a similarity to those of the one at bar calling much more persuasively for a similar approval of its decision herein than any possible analogy to be deduced from those in which its decisions have been condemned call for the opposite conclusion. In the case of **Cincinnati, New Orleans & Texas Pacific R. R. vs. Interstate Commerce Commission, 245 U. S. 136,** this Court held that whether competition at Augusta, Ga., justified the charging of a lower rate to that point than to Social Circle, an intermediate point, was peculiarly within the province of the Commission, and upheld its order to require no higher rate to Social Circle; and although appearing in connection with another state of facts, that is in substance the exact issue presented here.

In **St. Louis Southwestern R'y vs. United States, 245 U. S. 136,** heretofore cited, the issues present an analogy to

the present case, in that they involved discrimination against points not reached by the appellee's rails, and the Court upheld the Commission's finding of undue discrimination as a proper exercise of its discretion.

In **Manufacturers' R'y vs. United States, 246 U. S. 457,** the analogous question of discrimination in the absorption of switching charges of local terminal roads was involved; and while this Court emphasized the power of the Courts to review the findings of the Commission according to proper legal tests, it held no less decidedly that the issues presented were properly for the judgment of the Commission, whose findings should not be disturbed.

The contention in appellees' bill of complaint that the decision of the Commission herein indicates a design to impose a uniform system of rates on all railroads in the South, which should be checked by the courts, we conceive, calls for but brief notice. Virtually this simply means that the present decision will become a precedent for like findings in future cases, which perhaps is true; but if this be a valid objection it is one which would not only apply to all decisions of the Commission, but those of the courts as well. In answer to the implication of dire calamity apprehended from elimination of the policy of plussing junction point rates from short lines, we might, were it in order, assign some strong reasons why it would be the best thing that could happen, not only for the shipping public, but for the carriers themselves; but manifestly there is no such issue before the Court. It is sufficient to say that even such a final outcome is not beyond the power of the Commission, and if its future decisions tend in that direction, without proper foundation, the carriers will have the full benefit of the protection afforded them by the law in the power of review vested in the courts. As a matter

of fact, such matter can only be considered as entirely speculative and unsubstantial, since the entire record contains not the remotest intimation of any general policy had in mind, and a careful examination of the record will disclose that the Commission's findings are based entirely upon the facts developed in and applicable to the present case alone, and constitute a precedent for future cases only so far as they present the same state of facts.

Incidentally, attention may be called to the fact appearing from the record (p.p. 190-193) that this question was called to the attention of the Commission and considered by it on motion for rehearing; and its dismissal of such motion may logically be taken as a disclaimer of any such formulated policy. In this connection it is to be noted that such motion for rehearing was passed upon by a full Commission, with the entire record before it, which of itself is a sufficient answer to the criticism of the circumstances under which the decision was rendered, embodied in section IX of the bill of complaint. (Record, p. 6.)

The questions raised in the bill of complaint relating specially to the Fernwood, Columbia & Gulf Railroad Company, appellee, have been analyzed under our fifth, sixth and seventh propositions, and this analysis will serve largely as argument, and need only be referred to here to avoid repetition. It is desired, however, in addition to what we have said under our sixth proposition as to the claim of unremunerativeness on the part of that carrier, to refer to the case of **Manufacturers' R'y vs. United States, supra,** wherein this Court said, page 490:

> "Certainly, where the Commission, after full hearing, has set aside a given rate on the ground that it is unreasonably high it should require a clear case to justify a court, upon evidence newly ad-

> duced, but not in a proper sense newly discovered, in annulling the action of the Commission upon the ground that the same rate is so unreasonably low as to deprive the carrier of its constitutional right of compensation."

We have commented above on the paucity of proof on the hearing to enable the Commission to properly find that the putting into effect of the rates prescribed from Knoxo would deprive either of the appellees of their right to compensation, or even that the revenue of the Fernwood, Columbia & Gulf would necessarily be in any manner reduced. Not only has the enlarged burden of proof described in the above quotation been unmet, but no attempt has been made in the Court below to add to the record on this point before the Commission; and there is therefore no basis upon which this Court can disturb its findings thereon.

We have under our propositions referred to and commented on the attitude of the Fernwood, Columbia & Gulf as to the features of individual rate policy and participation in discrimination, and feel that the considerations therein pointed out are a sufficient answer to the contention of appellees in such respects. In addition, however, to the fact that this vague and unsubstantially technical contention is sufficiently answered by the findings of the Commission as to the practical aspect of the case, such contention must fail for another reason, which has reference to the fundamental issue in the case as found by the Commission. As already pointed out the real and substantial foundation of the Commission's finding of undue discrimination consists of the maintenance of uniform rates from a producing territory of wide extent; and it is important to note that this uniform basis is protected by the

Fernwood, Columbia & Gulf via its eastern junctions, and from Tylertown (and we venture to add from Foxworth and Columbia also, although this development occurred in time to be only hinted at in the record of evidence) via Fernwood. (Complainant's Exhibt 1, Original Record, p. 173.) It thus appears that the Fernwood, Columbia & Gulf is an active participant in the maintenance of the uniform group basis of rates, in comparison with which discrimination was found by the Commission, and is in no position to claim, as it does, that it has no such part therein as to make it chargeable with discrimination. Neither, for the same reason, can it maintain its plea of the unremunerative character of the rates prescribed by the Commission.

For the reasons above assigned, it is respectfully insisted that the judgment of the Court below should be reversed, and the cause remanded with instructions to dismiss the bill of complaint.

Respectfully submitted,

GEORGE J. GULOTTA,
Attorney for Swift Lumber Company,
Appellant.

L. PALMER,

FILE COPY

Office Supreme Court, U. S.
FILED
OCT 16 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

15

NO. 40

UNITED STATES OF AMERICA, *et al.*,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*,
Appellees.

BRIEF FOR ILLINOIS CENTRAL RAILROAD COMPANY.

ROBERT V. FLETCHER,
Attorney for Illinois Central Railroad Company.

WALTER S. HORTON,
Of Counsel.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

INDEX.

PAGE

STATEMENT OF THE CASE 1

ARGUMENT 7

SCOPE OF THIS BRIEF 7

THE COMMISSION'S ANOMALOUS PROCEDURE 8

LOCATION OF CARRIERS INVOLVED 9

THE RATE SITUATION 10

COMMISSION WITHOUT POWER TO DETERMINE POLICY.... 12

THEORY OF COMMISSION 13

THIS CASE IN CONFLICT WITH PRIOR AND SUBSEQUENT DECISIONS OF THE COMMISSION 19

THE LAW AS ANNOUNCED BY THE SUPREME COURT..... 25

THE COTTON BELT CASE 35

FERNWOOD & GULF PARTICIPATION IN RATES FROM FERNWOOD 36

TABLE OF CASES.

American Express Co. v. Caldwell, 244 U. S. 617, 624..... 33

Ashland Fire Brick Co. et al. v. Southern Ry. Co., et al., 22 I. C. C. 115, ...16, 19

Central R. R. Co. et al. v. United States, et al., 257 U. S. 247.13, 28, 31, 35

Central Yellow Pine Assn. Case, 10 I. C. C. 505 34

Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184 12

East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1 26

Hughes Creek Coal Co. et al. v. Kanawha & Michigan Ry. Co., et al., 29 I. C. C. 671 21

Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 43 Fed. 37 12

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 28

I. & S. Docket 329, Molasses Rates From Mobile, 28 I. C. C. 666.... 20

PAGE

I. & S. Docket 520, 34 I. C. C. 652 34

I. & S. Docket 545, 42 I. C. C. 548 34

Ladd & Co. v. Gould Southwestern Ry. Co., 36 I. C. C. 179..... 23

McGowan Foshee Lumber Co. v. F. A. & G. R. R. Co., 43 I. C. C. 581; 51 I. C. C. 317 23

Norman Lumber Co. v. Louisville & Nashville R. R. Co. et al., 25 I. C. C. 565 34

Philadelphia & Reading Ry. Co. v. United States, et al., 240 U. S. 334 30

Railroad Commission of Kansas v. A. T. & S. F. Ry. Co., 22 I. C. C. 407 21

Richmond Chamber of Commerce v. Seaboard Air Line Ry. Co., 44 I. C. C. 455 21

St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136,.144 35

Santee River Cypress Lumber Co. v. Collerton Cypress Co., 65 S. E. 826 8

Santee River Cypress Lumber Co. v. Collerton Cypress Co., 66 S. E. 116 8

State of Idaho, ex rel Public Utilities Commission v. Oregon Short Line R. R. Co., et al., 83 I. C. C. 4 22

Summerbell v. Summerbell, 36 N. J. Eq. 293 8

Swift Lumber Co. v. Fernwood & Gulf R. R. Co., 61 I. C. C. 485.... 2

Tift v. Southern Ry., 10 I. C. C. 548 34

Tindall v. Columbia Mills Co., 67 S. E. 908 8

Trast Co. v. Madsen, 132 N. Y. Supp. 316 8

United States, et al. v. Louisville & Nashville R. R. Co., et al., 235 U. S. 313 7

United States v. Baltimore & Ohio R. R. Co., 231 U. S. 274..... 29

United States v. A. T. & S. F. Ry. Co., 234 U. S. 476 37

Whitewater Lumber Co. v. A. C. Ry., 53 I. C. C. 278 23

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1923.

No. 40.

UNITED STATES OF AMERICA, *et al.*,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*,
Appellees.

BRIEF FOR ILLINOIS CENTRAL RAILROAD COMPANY.

STATEMENT OF THE CASE.

This case comes to this Court upon the appeal of the United States and the Interstate Commerce Commission from a final decree of the District Court of the United States for the Southern District of Mississippi, entered on the 10th day of February, 1922, (Rec. 180) by the terms of which there was enjoined, cancelled and set aside a

certain order of the Interstate Commerce Commission made in a case known as *Swift Lumber Company* v. *Fernwood and Gulf Railroad Company,* 61 I. C. C. 485. (Rec. 145.)

The case arose in this way:

The Fernwood, Columbia and Gulf Railroad (formerly the Fernwood and Gulf Railroad, by which name it will be herein designated) is a small line extending from Fernwood, Mississippi, on the Illinois Central in an easterly direction to Columbia, Mississippi, a distance of forty-four miles, where it connects with the Gulf and Ship Island Railroad. In its course it crosses and connects with The New Orleans Great Northern Railroad at Tylertown and at Foxworth. On the sketch reproduced at the end of this Brief the line of the Fernwood and Gulf is shown in green, the line of the Illinois Central, in red, and the line of the New Orleans Great Northern, in maroon. The Fernwood and Gulf is an independent railroad, in no way owned or controlled by any other railroad, nor is it in any way owned or controlled by any lumber company or other shipper. It is chiefly engaged in the transportation of forest products, that commodity constituting about ninety-three per cent of its traffic.

One of the stations local to the Fernwood and Gulf is Knoxo, conspicuously shown on the sketch and located between Tylertown and Foxworth. At Knoxo, at the time this controversy arose, was located the mill of the Swift Lumber Company, engaged in the manufacture of yellow pine lumber. It shipped this lumber to numerous interstate destinations, the most important of which were north of the Ohio River and east of the Mississippi. Through rates on this lumber from Knoxo to consuming territory were, generally speaking, two cents per hundred pounds higher than the rates from stations on the Illinois

Central and the New Orleans Great Northern, such as the junction points Fernwood and Foxworth.

On July 2, 1919, the Swift Lumber Company filed a complaint with the Interstate Commerce Commission making the Fernwood and Gulf, Illinois Central, New Orleans Great Northern and a great many other railroads parties defendant, in which complaint the rates on lumber from Knoxo are alleged to be unreasonable under Section 1 of the Interstate Commerce Act in that they are inherently too high, and further that under Section 3 of the Act these rates are unreasonably and unduly preferential of points on the trunk lines such as Fernwood and Foxworth, from which rates were in effect two cents lower than from Knoxo. (Rec. 18.) Answers were filed by the railroads chiefly interested and a hearing was had before one of the Commissioner's Examiners. Briefs were furnished by Complainant and Respondents, and thereafter in due course and in accordance with the practice of the Commission this Examiner made a tentative report (Rec. 138), in which it was recommended that the Complaint be dismissed on the ground that the rates attacked had not been shown to be either unreasonable under Section 1, nor unduly preferential under Section 3 of the Act.

Exceptions to this proposed report were filed by Complainant, and in due course, in accordance with the Commission's rules of procedure, the case was argued orally before a Division of the Commission, consisting of Commissioners Hall, Daniels and Woolley. Thereafter on April 5, 1921, a majority of the Commission, speaking through Commissioner Eastman, held that the rates under attack were not unreasonable under Section 1 of the Act, but were unduly preferential under Section 3, in that these rates were two cents per cwt. higher than the rates from the main line junction points, Fernwood and Foxworth. Three Commissioners, Messrs. Hall, Daniels

and Potter, dissented. At the time the case was decided, Commissioner Woolley, one of the three who heard the argument, had ceased to be a member of the Commission. It will be noted that of the three Commissioners who heard the argument, the two remaining on the Commission were in favor of the Defendants. The case was decided adversely to defendants by members of the Commission, no one of whom heard the argument, all of the members remaining on the Commission who heard the arguments being in favor of Defendants.

Timely application was made by the Defendants for rehearing or reargument, (Rec. 8), in which application Defendants pointed out the injustice of having the case decided by members who had not heard the argument, over the protest of those members who had. A rehearing, or reargument, was urged upon the further ground that the decision was unsupported by the evidence, and involved a misconception of the law. This application was overruled on July 5, 1921, without any further expression of opinion (Rec. 8). The Commission by its order June 24, 1921, extended the effective date of the order from August 5, 1921, to September 5, 1921.

On August 4, 1921, Fernwood, Columbia and Gulf Railroad Company and Illinois Central Railroad Company, two of the defendants in the proceeding before the Commission, filed their Bill of Complaint in the District Court of the United States for the Southern District of Mississippi, that being the judicial district wherein was the residence of the Swift Lumber Company, the party upon whose petition the order of the Commission was made (38 Stat. L. 219). The suit was brought against the United States as provided by the Urgent Deficiency Appropriations Act of October 22, 1913, and notice was given to the Attorney General of the United States and the Interstate Commerce Commission, as required by law.

The bill averred (Rec. 7) that the Swift Lumber Company, complainant before the Commission, by reason of a certain contract, was estopped to seek a reduction in the lumber rates from Knoxo; that the rates fixed by the Commission were confiscatory, particularly as applied to the Fernwood and Gulf; that the last mentioned company is a short line engaged chiefly in transporting forest products, the supply of which is rapidly being exhausted, and that within the comparatively near future this line will find itself with no business in which to engage, and that by reason of this fact, it, the Fernwood and Gulf, is, as a matter of constitutional right, entitled to make a charge for its services sufficiently high to take care of impairment of its investment due to diminishing tonnage; that the findings of the Commission as to undue preference practiced by Plaintiffs were entirely without support in the testimony, and that the Commission therefore, in making the order, acted arbitrarily; that in making the order the Commission exceeded its authority under the law in that Plaintiffs were held responsible for the acts of other carriers in which Plaintiffs had not participated and which were entirely beyond Plaintiff's control; that by its order, the Commission undertook to force Plaintiffs to adopt a policy as to rate-making which was against the interests of Plaintiffs and which Plaintiffs were not required to adopt by reason of any provision of law. To this bill the United States, by the Attorney General, filed a Motion to Dismiss (Rec. 163), the Interstate Commerce Commission an Answer (Rec. 164), and the intervening Complainant before the Commission, a Motion to Dismiss. The application of Plaintiffs for a temporary injunction was heard by agreement at Birmingham, Alabama, on August 18, 1921, the Special Court, organized in accordance with the Statute, consisting of Circuit Judge Walker and District Judges Foster and Grubb. The Court as so constituted issued a temporary

injunction (Rec. 167) restraining the action of the Commission upon condition that the Plaintiffs keep certain records of shipments. The case came on in due course for final hearing at New Orleans, Louisiana, (likewise by agreement) on November 26, 1921, before Circuit Judge Walker and District Judges Grubb and Holmes. Prior to this final hearing, intervenor Swift Lumber Company filed an Answer (Rec. 170). At this hearing there was introduced in evidence the entire record before the Commission. The Court by its Decree of February 10, 1922, (Rec. 180) made the temporary injunction perpetual, thereby in effect setting aside the order of the Commission. From this final decree the United States and the Interstate Commerce Commission prosecute this Appeal.

ARGUMENT.

Scope of This Brief.

The brief is filed on behalf of the Illinois Central Railroad Company. Very largely the argument herein will be limited to questions that concern that line, although necessarily some reference will be made to the situation of the Fernwood and Gulf, co-plaintiff with the Illinois Central. There are, however, certain issues raised by the Bill which relate solely to the Fernwood and Gulf and these questions will be argued in the separate brief to be filed by that line. We purpose to confine our discussion to these points:

1. The Commission, in finding Plaintiffs guilty of undue and unreasonable preference exceeded its statutory powers in that Plaintiffs were held responsible for conditions over which they had no control and which it is beyond their power to remedy.

2. That the Commission in rendering its decision and making its order in this case acted arbitrarily in that its conclusions were wholly unsustained by proof.

As pointed out by this Court in *United States et al.* v. *Louisville and Nashville Railroad Company, et al.*, 235 U. S. 313, these questions are closely related and can perhaps best be considered together.

The Commission's Anomalous Procedure.

In our Statement of Facts we have referred to a curious state of affairs by reason of which the Commissioners participating in the Decision who heard the argument were in favor of these Appellees, but the judgment of these Commissioners was overruled and the case decided by other Commissioners who did not hear the argument. While we are not contending that this method of disposing of the case renders the judgment void, yet we do insist that the procedure was highly irregular, if not unprecedented. It is a well-settled rule, governing the deliberation of all tribunals acting judicially, that when those who did not hear the argument differ in opinion from those who did, a re-argument will be granted as of course. In

Santee River Cypress Lumber Co. v. *Collerton Cypress Co.*, 65 S. E. 826,

it is said:

> "At the time this case was heard on appeal to the Supreme Court, it was composed of four justices, one of whom has since retired. Of the remaining justices, two are of the opinion that the judgment of the Circuit Court should be reversed, while the other is of the opinion that it should be affirmed. Under these circumstances a reargument will be necessary."

See also:

Santee River Cypress Lumber Co. v. *Collerton Cypress Co.*, 66 S. E. 116.
Tindall v. *Columbia Mills Co.*, 67 S. E. 908.
Summerbell v. *Summerbell*, 36 N. J. Eq. 293.
Trast Co. v. *Madsen*, 132 N. Y. Supp. 316.

We insist that the presumptions of correctness that usually attend decisions of the Commission is greatly weakened by the fact that the ordinary rule governing

the action of courts was not followed in this case. Certainly the courts would approach the consideration of this case with much more confidence in the correctness of the decision if the Commissioners deciding against the carriers had heard the argument. The carriers were able to convince the Commissioners who heard them; they should have been given an opportunity to argue to those who were opposed.

Location of Carriers Involved.

We have appended hereto a map or blue print in which we show in colors the lines of railway serving the State of Mississippi mentioned in the Commission's decision. This map shows in *red* the line of the Illinois Central transversing the western part of the State of Mississippi and the eastern part of Louisiana, running north and south. Crossing the main line of the Illinois Central at Hammond, Louisiana, is a branch line extending east and west which branch line is also shown in *red*. In the southern part of the State of Mississippi will be found the line of the Fernwood and Gulf, shown in *green*, extending from Fernwood on the Illinois Central through Tylertown and Foxworth, points on the New Orleans Great Northern to Columbia on the Gulf and Ship Island. On this line will be found Knoxo between Tylertown and Foxworth. Tributary to the Illinois Central appear such small independent lines as the Sardis and Delta and Batesville Southwestern in North Mississippi, Natchez, Columbia and Mobile in South Mississippi, and the Kentwood and Eastern and New Orleans, Natalbany and Natchez in Louisiana. These short lines are colored in *purple*. From points on these independent lines, just as from Knoxo, a point on an independent line, the rates on lumber are higher than from main line points on the Illinois Central.

The line of the New Orleans, Great Northern Railroad extending from Jackson, Mississippi, to New Orleans, roughly parallel with the line of the Illinois Central is shown in *maroon*. Extending from Natchez, Mississippi, on the Mississippi River eastward through Brookhaven, Mississippi, on the Illinois Central, and Wanilla, on the New Orleans, Great Northern, to Hattiesburg on the New Orleans and North Eastern, is an east and west line known as the Mississippi Central, shown on the map in *yellow*. The lines of the Mobile and Ohio, Gulf, Mobile & Northern and New Orleans and Northeastern railroads in Mississippi competitive with the Illinois Central in the transportation of lumber to northern markets are shown in *black*. Appearing in *pink* on this map are certain short lines, viz.: Pearl River Valley, tributary to the New Orleans and North Eastern, Mississippi and Western, tributary to the Gulf Mobile and Northern and Alabama and Mississippi (now abandoned) tributary to the Mobile and Ohio. The reason for calling special attention to these lines of railway, large and small will be manifest.

The Rate Situation.

From points on the Illinois Central in Mississippi south of Jackson rates on lumber to northern destinations are ordinarily the same. In the Commission's opinion reference is made to these rates being "blanketed" from all the pine-producing territory in South Mississippi, but as a matter of fact these rates are not "blanketed" in the ordinary sense of the term. This is true for the reason that while the same rates apply from Illinois Central stations south of Jackson, these rates do not apply from stations on other roads (except the Mississippi Central, for which there is a special reason which we will discuss later). So that in all cases rates from

stations on such independent short lines as the Fernwood and Gulf, New Orleans, Natalbany and Natchez and Natchez, Columbia and Mobile are in every case from one to four and one-half cents higher than rates from Illinois Central stations. The Commission so finds in its opinion in this case. It says:

> "It is not and has not been the practice of defendants Illinois Central and New Orleans Great Northern to extend the junction point or blanket basis of rates on lumber to points on short line railroads in this territory. The Illinois Central and its affiliated line, the Yazoo & Mississippi Valley, connect with eight such short-line carriers and none of them has the blanket rates. Lumber rates exceed the rates from the junction points by arbitraries ranging from 1 to 4½ or 4.5 cents." (Rec. 146.)

It will thus be seen that it has never been the traffic policy of the Illinois Central to extend its junction rates to local points on these independent short line railroads. And it is established in this case, and so found by the Commission, that this policy is the one that generally prevails throughout the territory lying south of the Ohio River and East of the Mississippi. Thus the Commission says:

> "Indeed, the general, although not the universal practice throughout the Southeast appears to be to make rates from local points on independent short lines by adding an arbitrary to the rate from the junction point. There are 95 such carriers in the territory east of the Mississippi and south of the Ohio, referred to in this record, and rates on lumber from local points on these roads are made on the arbitrary basis in 55 cases, on combinations of locals in 27, and on the junction point or blanket basis in but 13." (Rec. 147.)

The order of the Commission in this case requires the carriers to establish the Knoxo rates on the junction-

point basis, holding that any other basis is unlawful and therefore requiring the carriers to abandon a policy which represents the practice in 86% of the cases.

Commission Without Power to Determine Policy.

Since the Commission in the Decision under attack seeks to reverse the settled policy of 86% of the carriers, among whom is this Appellee, and since the Commission is without power to substitute its own ideas as to proper policies for those of the carrier, some basis grounded on the law must be found before the carriers can be forced to abandon this policy of rate-making. For it is still true:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."
>
> *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 43 Fed. 37.
>
> (Quoted with approval by this Court in *Cincinnati, New Orleans and Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, p. 197 of opinion.)

That their view so expressed is not an outgrown sentiment is shown by the fact that this Court as late as December, 1921, pointed out the fact that with all the changes in the regulating statutes wrought by the Trans-

portation Act, Section 3, the discrimination statute so-called, remains unchanged and is now in purpose and scope as it was in 1900.

Central R. R. Co. et al. v. *U. S. et al.*, 257 U. S. 247, (page 259, 260 opinion).

It behooves us, therefore, to look closely to the issues in this case, the character of the testimony, the findings of the Commission and the applicable provisions of law to ascertain if the Commission had the power under the statute to compel appellees to cease to charge rates which are found to be reasonable merely because one of the Appellees charges lower rates from its own stations, and participates, under the force of compelling competition in a few other rates over which it has no control.

Theory of Commission.

It is an important fact, always to be remembered in considering this case that the Commission found the rates from Knoxo to be reasonable under Section 1 of the Act. The essential findings of the Commission are thus expressed:

> "We do not find that the rates on yellow-pine lumber, timber, and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable, except that we find that the rates to points in Tennessee, which were made by combination of the local rates to and beyond Fernwood, were unreasonable to the extent that they exceeded the corresponding contemporaneous rates from Fernwood to the same destinations by more than 2.5 cents per 100 pounds.* We do find, however, that subsequent to January 1, 1919, the rates on yellow pine lumber, timber and lumber

* Rates to these Tennessee points are not in issue here, this finding of the Commission as to the unreasonableness of rates to this limited territory having been acquiesced in by the carriers, and the situation corrected.

products from Knoxo to Ohio River crossings, to points in Wisconsin, Minnesota, Iowa, and Missouri, to points in Central and Eastern Trunk Line territories and to points in Tennessee and Kentucky the rates to which are blanketed from points producing yellow pine on the Illinois Central and New Orleans Great Northern railroads south of Jackson, Mississippi, were, and that for the future they will be, unduly prejudicial to Complainant to the extent that they exceed the blanket basis of rates from Fernwood, Tylertown and Foxworth." (Rec. 150, 151.)

We have, then, a case where the carriers are required to abandon a reasonable rate from a point on an independent short line, requiring at best a two line haul, for the reason that one of these carriers maintains a lower rate for a shorter distance involving a one line haul, and quite obviously therefore a less expensive service. On the face of it such a requirement would seem difficult to justify except upon a clear showing of preference.

The Commission's conclusion that such undue preference exists may be said to rest upon two somewhat distinct grounds. The first of these is that the Illinois Central participates in rates from stations on the Mississippi Central (shown in *yellow* on the map) and from stations on the Pearl River Valley, Mississippi and Western and Alabama and Mississippi Railroads (shown in *pink* on the map) on the "blanket" basis of rates, and should therefore be forced to apply that basis to Knoxo, a point on another independent short line, the Fernwood and Gulf. At the outset it should be observed that the rate from Knoxo cannot be reduced or changed in any way without the concurrence of the Fernwood and Gulf. The Illinois Central is, obviously, powerless to change a joint through rate without the concurrence of the other party to the rate. The Commission's order requires the Illinois Central and the Fernwood and Gulf to join in publishing a reduced rate, affecting the revenues of both

upon the ground that one of these carriers, the Illinois Central, participates elsewhere in a similarly reduced rate. No one can pretend that the Fernwood and Gulf is in any way responsible for rates prevailing from stations on railroads like the Mississippi Central or the short lines tributary to the Gulf, Mobile and Northern and other roads. This little road, the Fernwood and Gulf, could never handle any of this lumber. It is a party to no through rates affecting any of this traffic. Upon what rational theory is this short railroad required to shrink its revenue, even if its connection, the Illinois Central, does practice discrimination? The opinion of the Commission nowhere answers this question. But aside from the consideration just stated, the Illinois Central does not violate Section 3 of the Interstate Commerce Act by participating in through rates from Mississippi Central stations, and stations on the short lines shown in *pink* on the map while at the same time refusing to participate in rates on the same basis from Knoxo.

And, first as to the Mississippi Central points.

In its opinion the Commission says:

> "Defendants New Orleans Great Northern and Illinois Central show that the Mississippi Central is now 160 miles in length; that it handles considerable traffic other than lumber; that it had joint rates on the junction-point basis with the New Orleans and Northeastern prior to the establishment of connections with the New Orleans Great Northern at Wanilla, Mississippi, and with the Illinois Central at Brookhaven, Mississippi; and that they were forced to extend the blanket rates to it because of competition." (Rec. 147.)

This statement of the Commission is based upon undisputed evidence (Rec. 94, 95) that the construction of the Mississippi Central (shown in *yellow* on the map) was begun at Hattiesburg, and from there the line was built

west. As soon as enough of the line was finished to permit the beginning of operation, the New Orleans and Northeastern (having a traffic policy different from that of the Illinois Central) joined with the new line in establishing rates from the new line's local stations on the junction point (Hattiesburg) basis. When the line was built to a junction with the New Orleans Great Northern (Wanilla), and later to a junction with the Illinois Central (Brookhaven) these two lines were forced to establish the same basis of rates with the Mississippi Central or else forego any participation in the traffic. And even if the New Orleans and Great Northern and the Illinois Central had refused to join in through rates from Mississippi Central Stations on the junction-point basis the shippers at Knoxo would not have been one whit better off. For shippers at Mississippi Central Stations, if considered competitors of the shipper at Knoxo, would still have had the lower basis of rates *via* Hattiesburg and the New Orleans & Northeastern and connections. And so, now, if the Illinois Central and the New Orleans Great Northern were to withdraw from participating in through rates from Mississippi Central stations to important destination territory to the north, the competitors of the Swift Lumber Company, if such there be, located at these local stations on the Mississippi Central would still have the lower through rates by way of the New Orleans and Northeastern and its numerous northern connections. The ordinary test of discrimination, to use a convenient, short term for the unreasonable and undue preference denounced in Section 3 of the Act, is as stated by the Commission, the

> "ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."
>
> *Ashland Fire Brick Co. et al.* v. *Southern Ry. Co. et al.*, 22 I. C. C. 115,

the Commission's leading case on this subject. Here it is too clear for argument that the Illinois Central is powerless to prevent, by any action it may take, the securing of the junction basis of rates by shippers located at these Mississippi Central stations, so long as the route *via* Hattiesburg is open to all of them.

Coming, now, to the charge of discrimination based on the Illinois Central's participation in rates from local stations on the short lines of railroad shown on the map in *pink,* it will be noted that none of these lines is tributary to either the Illinois Central or the New Orleans and Great Northern. The Peral River Valley is an adjunct of the New Orleans and North Eastern, the Mississippi and Western, of the Gulf, Mobile & Northern and the Alabama and Mississippi (when in existence) of the Mobile and Ohio. These last mentioned trunk lines in conjunction with their short line connections have seen proper in the exercise of their right to determine their own policies, to establish the junction point basis of rates at stations on these short lines. But neither the Illinois Central nor the Fernwood and Gulf had anything whatever to do with the adoption of this policy, nor is it within their power to bring about any change in this policy by any act of theirs. It is true that the Illinois Central (but not the Fernwood and Gulf) is a party to certain joint through rates whereby traffic originating on these short lines shown in *pink* on the map may move to remote northern destinations, but if the Illinois Central were to withdraw from such tariffs practically all of this traffic could reach the desired destinations by routes in which the Illinois Central does not participate. The Commission recognizes this in its opinion where it says:

> "The Alabama & Mississippi extends from Pacagonla, Mississippi, served also by the Louisville & Nashville, through Evanston, Mississippi, where it

crosses the Gulf, Mobile & Northern, to Vinegar Bend, Alabama, where it connects with the Mobile & Ohio. The Mississippi & Western is a short line which connects with the Gulf, Mobile & Northern at Stevens, Mississippi. The Cybar, Gulf & Northern no longer exists. A part of its line is now owned by the Pearl River Valley, connecting with the New Orleans & Northeastern at Picayune, Mississippi. It is to be observed that none of these roads connects with either the Illinois Central or the New Orleans Great Northern, yet both these defendants concur in joint rates on the blanket basis from local points on these short lines. It appears, however, that if the Illinois Central and the New Orleans Great Northern should refuse to concur in these joint rates, similar rates would still apply to most destinations *via* other routes." (Rec. 147.)

It is clear, therefore, that the charge of discrimination is not made out because the Illinois Central participates in these rates. Much less could such a charge be made against the Fernwood and Gulf which never could, by any stretch of imagination, be conceived of as participating in these rates.

In this connection, we venture to repeat that the Illinois Central, as stated in the Commission's report, has consistently and impartially declined to aid in establishing the junction basis of rates at any local points on short line railroads, tributary to its line.

A careful reading of the Commission's brief in this case rather leads to the conclusion that the writer thereof conceives that the Commission's opinion is not based upon any assumed discrimination practiced by the Illinois Central in connection with rates from Mississippi Central stations and stations on the short lines shown in *pink* on the map, but rather on the theory that because the Illinois Central carries a certain rate from its own stations, which applies from the junction point Fernwood and points south thereof, it must in some fashion

not very clearly set out, establish the same rate in connection with the Fernwood and Gulf from Knoxo, a point off the line of the Illinois Central. Or looking at the problem from another point of view, namely, that of the Fernwood & Gulf, that this short line must in some way force its strong connection, the Illinois Central, to join in a reduced through rate because the Illinois Central applies a lower rate from certain of its stations with which lower rate, obviously the Fernwood & Gulf has nothing whatever to do. We think it can be demonstrated both upon reason and authority that in making this order based as it is upon alleged discrimination under Section 3, the Commission has overstepped the limits of the powers conferred upon it by the Congress.

This Case in Conflict with Prior and Subsequent Decisions of the Commission.

We assert that this case is at war with the current of the Commission's own decisions, rendered both prior and subsequent to the decision in the instant case. As we have said, the leading case before the Commission on this subject is

Ashland Fire Brick Co. et al. v. *Southern Ry. Co. et al.*, 22 I. C. C. 115.

In that case the Commission says:

> "It is true that we have held in cases where joint or proportional rates were made by all of the carriers leading to certain points of destination that it was within our power to end a discrimination as between points of origin by a reduction in the rate from a certain point that was discriminated against. *Indiana Steel & Wire Co.* v. *C. R. I. & P. Ry. Co.*, 16 I. C. C. Rep. 155; *Railroad Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 7 I. C. C. Rep. 418. This principle, however, only has application where the traffic from both groups of origin is *necessarily*

> transported to destination by the same connecting carrier or carriers and where it is possible for the delivering carriers to put an end to the discrimination by the exercise of their power to refuse to enter into preferential joint or proportional rates. * * * The test of the discrimination is ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."

So in the case known as

> I. & S. Docket 329, Molasses Rates from Mobile, 28 I. C. C. 666,

in which it was contended that the Mobile & Ohio Railroad would be guilty of discrimination as against New Orleans if it established low rates from Mobile to St. Louis, the Commission said:

> "Respondent does not reach New Orleans, and cannot publish a rate from that point without the concurrence of connecting carriers which reach New Orleans. Inasmuch as the respondent is in such a position that it cannot by its own authority establish a rate from New Orleans to St. Louis, although it is willing to join in a 15-cent rate from New Orleans to St. Louis on both domestic and imported blackstrap, it cannot be said that it subjects shippers at New Orleans to undue prejudice or disadvantage within the meaning of Section 3 of theAct." (See p. 669.)

This language of the Commission is exactly applicable here. Just as the Mobile & Ohio does not reach New Orleans, so the Illinois Central does not reach Knoxo, and cannot publish a rate from that point without the concurrence of the Fernwood & Gulf. It is not, therefore, in a position, by its own act, to remove the so-called discrimination, and cannot as a matter of law be thereby convicted of giving an undue preference. On the other hand, the Fernwood & Gulf has nothing to do with rates

that are alleged unduly to prefer other points, and cannot lawfully be made a party to a discrimination order.

In

Hughes Creek Coal Co. et al. v. *Kanawha & Michigan Ry. Co. et al.*, 29 I. C. C. 671, the Commission says after citing certain cases:

> "The test of discrimination we find in these cases is the ability of one of the carriers participating in the two through rates to put an end to the discrimination by its own act. It is testified here that the Chesapeake and Ohio Lines have the same joint rates to the Kanawha and Michigan destinations in question by a number of lines other than the Kanawha and Michigan, and that consequently if the Kanawha and Michigan were to withdraw its participation from the joint rates in question, substantially the same advantage would be enjoyed by the Chesapeake and Ohio operators. Under the circumstances, therefore, the Kanawha and Michigan has no such control of the situation as would justify a holding that it is guilty of undue discrimination by participation in the rates." (p. 680.)

See also:

Railroad Commission of Kansas v. *A. T. & S. F. Ry. Co.*, 22 I. C. C. 407.

Richmond Chamber of Commerce v. *Seaboard Air Line Ry. Co.*, 44 I. C. C. 455.

These cases and many others that might be cited show that prior to the decision in the instant case, the Commission had steadfastly recognized the limits upon its authority, and had correctly interpreted the law in line with certain principles laid down by this Court in cases to which we shall presently refer. And curiously enough, even since the rendition of the instant decision, the Commission has repudiated the doctrine there announced, and has recurred to its former standards. We have a

striking instance of this in a case just decided, reported under the name and style of

> *State of Idaho, ex rel Public Utilities Commission,* v. *Oregon Short Line R. R. Co. et al.,* 83 I. C. C. 4,

where it is said:

> "The mere showing that rates from one point in a territory are higher than rates, blanketed or not, from other points in that territory, whether maintained by the same carrier or by different carriers, does not establish undue prejudice or preference. Here the points alleged to be unduly preferred are on defendant's line. The points alleged to be subjected to undue prejudice are local to the traction line. Defendant does not, and cannot without the co-operation of the traction line, establish the rates from those points. The traction line is willing to join in establishing the blanket rate from the points which it serves provided it continues to receive its full revenue for its local haul. Thus, on a shipment from Meridian or Boise, points common to both lines, defendant now receives the entire blanket rate, but if the shipment were made from a point local to the traction line, intermediate between Meridian and Boise, defendant would receive only what is left of the blanket rate after paying to the traction line a division equal to the full local rate of the latter. That local rate is now paid by the shipper. The financial condition of the traction line is unfavorable. During 1921 it failed to earn operating expenses and interest on its funded debt by more than $54,000. Its general manager testified that its rates were established on a low basis due to the fact that the blanket rates did not apply to or from points local to its line.
>
> "Upon this record we find that the rates assailed are not unreasonable or unduly prejudicial. The complaint is dismissed."

This is the sound and true doctrine. And it may be said in passing that the condition of the traction line

described in the report is certainly no worse than that of the Fernwood & Gulf as shown by the evidence and as pointed out in the brief filed in this Court by that line.

Indeed we venture the assertion that the instant case is unique among the decisions of the Commission unless an exception is found in the *Wyoming Railway Company case,* No. 38, argued and submitted in connection with this case. It is true that the Commission in the instant case refers as authority to the case of

> *McGowan Foshee Lumber Co.* v. *F. A. & G. R. R. Co.,* 43 I. C. C. 581; 51 I. C. C. 317,

and one of the dissenting Commissioners refers also to:

> *Whitewater Lumber Co.* v. *A. C. Ry.,* 53 I. C. C. 278,

and

> *Ladd & Co.* v. *Gould Southwestern Ry. Co.,* 36 I. C. C. 179.

But an examination of these cases will readily disclose their inapplicability. In the *Ladd case,* as pointed out in the dissenting opinion of Commissioner Daniels (Rec. .....) it was the settled policy of railroads west of the Mississippi River, in which territory this case arose, to extend the junction point rates to points on independent short lines, and the Commission's decision did no more than to require the carriers to put the Complainant on a parity with others. In the *Whitewater case,* as a reading of the decision shows, the Mobile & Ohio, the trunk line, had voluntarily extended the junction rates to points on independent short lines, but had refused to do so for complainant, located on a short line, the Alabama Central. No such situation exists here. Considered superficially, the *McGowan-Foshee case* may have points of resemblance with this case, but a close examination discloses marked points of dissimilarity. This case dealt

with the rates from Falco, Alabama, which is the northern terminus of a short line known as the Florida, Alabama and Gulf Railroad. This railroad connected with the Louisville & Nashville at Galliver, Florida, 26 miles from Falco. The rates from Falco were 3¼ cents higher than the rates from Galliver, the junction point. The Commission held that the rates from Falco should not be higher than the rates from Galliver, the junction point. It appears that the Louisville & Nashville Railroad, in the opinion of the Commission, had failed to establish that it was its settled policy not to extend the junction rates to the interior. Notice this language of the Commission:

> "In explanation of its participation in joint through rates on the blanket basis from points on the Gulf & Ship Island, New Orleans Great Northern, Mississippi Central, New Orleans, Mobile & Chicago, Central of Georgia, Atlantic Coast Line, and Seaboard Air Line Railroads, and not from Falco on the Florida, Alabama & Gulf, the Louisville & Nashville contends that the first named lines are trunk lines and should be considered in a different category from the last named line. It contends that these so-called trunk lines have direct connection with one or more other trunk lines reaching the Ohio River, and that the Louisville & Nashville is therefore compelled by competition to participate in the blanket basis. On this question, however, the record does not show as to all the originating lines above named whether, in participating in the blanket basis from points thereon, the Louisville & Nashville is meeting the competition of other trunk lines, or the other trunk lines the competition of the Louisville & Nashville." (pp. 585, 586.)

In the case at bar the testimony clearly shows, and the Commission in fact finds, that neither the Illinois Central nor the Fernwood and Gulf is or can be responsible for the rate structure that prevails from Mississippi

Central points, and from points on the short lines in question.

However, the principal distinction perhaps between the instant case and the *McGowan-Foshee case* is that in the last named case the Commission found the rate from Falco to be unreasonable in and of itself. Thus it is said by the Commission:

> "We further find that the rates on yellow pine lumber from Falco to the destination in question are, and since January 1, 1916, have been, unreasonable and unduly prejudicial to complainant to the extent that they exceed or have exceeded the rates from Galliver by more than 2 cents per 100 pounds, and that for the future they will be unduly prejudicial to complainant to the extent to which they exceed the blanket basis of rates from Galliver to the same destinations." (p. 587.)

We see, therefore, that the Commission in this case has blindly followed the *McGowan-Foshee case,* a case of doubtful authority under the law, and in any event, one in which the findings of the Commission were entirely different; for it must be remembered that in the instant case the rate from Knoxo was found to be reasonable. Thus the Commission says:

> "We do not find that the rates on yellow pine lumber, timber and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question, were intrinsically unreasonable." (Rec. 150.)

The Law as Announced by the Supreme Court.

We call attention to a few outstanding cases, construing the Discrimination Section of the law, and laying down the general principle that the Interstate Commerce Commission cannot, on the ground of discrimination, condemn reasonable rates established by a carrier where

the discrimination is not the fault of the carrier and cannot be removed by the carrier through its voluntary act.

The leading case on this subject is:

East Tennessee, Virginia & Georgia Ry. Co. v. *Interstate Commerce Commission,* 181 U. S. 1.

The opinion is by Justice White. It is one of the most careful and comprehensive interpretations of the power of the Commission under the Third Section of the Interstate Commerce Act that can be found. The case arose on the complaint of the Board of Trade of Chattanooga, it being asserted by the commercial interests of that City that the carriers, in making rates from eastern territory to Chattanooga, discriminated against that City in favor of Nashville; that the traffic moved to Nashville through Chattanooga, when it moved over certain southern lines, and that under the long and short haul clause, (the Fourth Section,) it was a violation of law for the carriers to apply lower rates to Nashville, a more distant point, than to Chattanooga, a nearby point. The facts showed that the rates to Nashville from this eastern territory were controlled by carriers operating over the northern route through Cincinnati to Nashville. The L. & N. did not reach Chattanooga and had no interest in that traffic.

Before the case was finally decided, the Supreme Court, in another case, had held that the prohibition of the long and short haul clause applied only when circumstances and conditions were the same. It was conceded, therefore, on all sides that the action of the southern carriers serving Chattanooga in applying lower rates to Nashville than to Chattanooga did not violate the long and short haul clause as it stood then. It was argued however, by the Chattanooga shippers that under the Third Section—the Discrimination Section—it was unlawful for the southern carriers to apply lower rates to

Nashville than to Chattanooga. Much of the decision is based on this contention. Mr. Justice White, in discussing this, uses this language:

> "In a supposed case when, in the first instance, upon an issue as to the violation of the Fourth Section of the Act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity of rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the Third Section of the Act, forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the Third Section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of, as having given undue preference, and does not relate to acts, the result of conditions wholly beyond the control of such carriers." (p. 18.)

Again Judge White says:

> "Indeed the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstances and conditions into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstances and conditions, the preference in favor of Nashville growing

out of the conditions there existing would have remained in force, and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play." (p. 19.)

Again Judge White says:

"Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefitting the public." (p. 20.)

This case has been often cited, and its authority remains unshaken. It must be so, since it rests upon the plainest dictates of reason, and the most ordinary canons of common sense. This case has recently been cited with approval.

Central R. R. Co. etc., v. *United States et al., supra.*

In the case of

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42.

there was involved the question of whether the carriers were guilty of undue discrimination because they paid

certain elevator allowances at Omaha did not pay similar allowances at St. Louis. Certain carriers served Omaha and not St. Louis. Certain other carriers served both cities. The practice of paying elevation allowances originated at Omaha on the line of the carriers that did not serve St. Louis. The Commission held that the St. Louis carriers were guilty of discrimination because they paid allowances at Omaha and not at St. Louis, these two markets being considerably in competition. The Supreme Court overthrew the decision of the Commission, using this language:

> "The Union Pacific made the allowance in question to elevators at its *termini*. It had no motive to make them anywhere else. The competitors of the Union Pacific concerned in the *Diffenbaugh case* were compelled by competition to make the same allowance at Missouri River points, but they also made it nowhere else. The Traffic Bureau Merchants Exchange of St. Louis complained to the Commission that the result was a discrimination against St. Louis of ¾ of a cent per 100 pounds. But the principle of the decision is that the allowance to elevators upon their own grain is to be stopped everywhere unless they are prevented from using the opportunity for treating their grain. Therefore, this question of preference between the cities does not need to be discussed. But as remarked below, the Union Pacific could not be complained of on this ground, 176 Fed. Rep. 424, and it would be impossible to deny the same right to competing roads merely because as the result of the conditions one side would gain and another lose. *Louisville & Nashville Railroad Co.* v. *Behlmer*, 175 U. S. 648." (See p. 48 of the opinion.)

In the case of:

> *United States* v. *Baltimore & Ohio Ry. Co.*, 231 U. S. 274,

commonly known as the "Sugar Lightering Case," where the Commission had found that the carriers were guilty

of discrimination because they paid allowances for lightering sugar from the plant of Arbuckle Brothers, within the lighterage limits, while at the same time refusing to pay an allowance for lightering sugar from the Federal Sugar Refining Company, beyond the lighterage limits, the Court overruled the decision of the Commission and held that there was no evidence in the Record of a substantial nature to warrant the finding of the Commission, in view of the fact that circumstances and conditions surrounding the movement from the Federal Sugar Refining Company were different from those surrounding the movement from the plant of Arbucle Brothers.

A case very much in point is

Philadelphia & Reading Ry. Co. v. *United States et al.*, 240 U. S. 334.

In that case it appeared that the Commission had made an order that the Philadelphia & Reading Railway was guilty of undue discrimination for the reason that it maintained a rate of $1.35 on cement from Evansville, Pennsylvania, to Jersey City. Evansville is a local point on the Reading, and the Reading extends from Evansville to Allentown, where it delivers the traffic to some one of its numerous connections. It appeared that these connecting lines maintained a rate of 80 cents from mills on their rails in the neighborhood of Evansville, to Jersey City. However, the Reading Railroad does not participate in this 80-cent rate. The Court will observe that this is precisely the state of facts that exists in the case at bar. If we substitute the Fernwood & Gulf for the Reading, we have the precise situation, for the Fernwood & Gulf does not participate in any rate carried by the Illinois Central from points on its line. The Commission having condemned the $1.35 rate maintained by the Reading, the Supreme Court overruled its decision, pointing out the fact that the $1.35 rate was not declared

unreasonable, nor was there any finding as to the reasonableness, either intrinsic or relative, of the 80-cent rate. The Court says:

> "If a universal rate of $1.35 could not justly be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule." (p. 341.)

This case is particularly applicable to so much of the Commission's conclusion as is based upon the view that the Illinois Central is guilty of discrimination in maintaining lower rates from its own stations than prevail from Knoxo. The principles underlying all the essential features of this case are settled in the recent case of

Central R. R. Co. v. *United States,* 257 U. S. 247.

In that case the decision in which is so recent and familiar that extended comment is unnecessary, the Court set aside a finding of discrimination made by the Commission under Section 3 of the Act, on the ground that carriers in northern territory against whom the Commission's order ran were in no way responsible for the grant of the creosoting in transit privilege, allowed by carriers in southern territory, and that the mere fact that carriers both North and South were parties to joint through rates carrying the material which was the subject of the privilege, did not make the northern carriers responsible for the acts of their southern connections. This case puts to rest the "partnership" theory as applied to railroads joining in the establishment of through rates. As the Court says:

> "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one

locality than to another similarly situated. *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 221, 222, 225. Compare East *Tennessee, Virginia and Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18.

If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of No. 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, February 28, 1920, C. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of No. 3."

This language is most significant. It is no answer to this statement of a broad general rule to say, as the Commission says in its brief, that this decision deals only with local practices. It is an emphatic announcement of a wholesome, general rule that a carrier cannot be adjudged guilty of granting unlawful preferences, if it is in no way responsible for such preferences. The decision goes further. It rejects as utterly unsatisfactory, illusory and impracticable the suggestion that a carrier in no way to blame for a discrimination shall nevertheless withdraw from all joint through rates with the responsible carriers, thereby disrupting the rate structure, depriving the public of needed through rates and yet leaving the complaining shipper in no way better off. In the instant case, the undue preference, if it exists at all grows out of:

First, participation by the Illinois Central in lower rates from Mississippi Central points than from Knoxo.

But for this the Fernwood & Gulf is in no way responsible, and if the Illinois Central withdraw its participation, the traffic would still move *via* Hattiesburg and the New Orleans and Northeastern Railway at the lower rates. The situation of the Swift Lumber Company would be in no way improved.

Second, participation by Illinois Central in through rates from small railroads shown in *pink* on the map. But the Fernwood & Gulf does not participate in any way in such rates, and furthermore, if the Illinois Central withdraw from these joint tariffs, the traffic would move at the present rates *via* routes other than the Illinois Central, and the Swift Lumber Company would be no way bettered.

Third, maintenance by the Illinois Central of lower rates from its own stations than the joint rates from Knoxo. But obviously the Fernwood & Gulf has nothing to do with these Illinois Central rates, and is powerless to change them. On the other hand, the Illinois Central has no power to change the Knoxo rate except by the concurrence of the Fernwood & Gulf. It is of the essence of a discrimination order that the carrier be left free to remove the discrimination by one of three methods: the high rate may be reduced to the level of the low rate, or the low rate may be raised to the level of the high rate, or the two rates may be changed to meet at some intermediate point.

> *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624.

Since it is impossible for the Knoxo rate to be lowered, without involving an innocent party, namely, the Fernwood & Gulf, it is clear that, in effect, the Commission's order does not allow any alternative. The only thing that can be done is to increase the rates from Fernwood.

It is suggested in the brief of the Commission that this may be the remedy. But if this is done, all the rates from points south of Fernwood would have to be increased to avoid violations of the Long and Short Haul provision of the Fourth Section of the Act. In other words, this method of removing the so-called discrimination would utterly disrupt the so-called blanket adjustment of rates applying from the yellow-pine producing territory south of Jackson, Mississippi. It is extremely unlikely that the Commission would require, or indeed permit, the Illinois Central to increase these rates, thereby putting rates from Fernwood and points south on a substantially higher basis than prevails from other parts in this producing territory. Compare

Central Yellow Pine Assn. case, 10 I. C. C. 505.
Tift v. *Southern Railway,* 10 I. C. C. 548.
Norman Lumber Co. v. *L. & N. R. R. Co. et al.,* 25 I. C. C. 565.
I. & S. Docket, 520, 34 I. C. C. 652.
I. & S. Docket, 545, 42 I. C. C. 548.

In these cases the Commission has, in most elaborate fashion, considered the rates from this territory of production, particularly in relation to rates from competitive origin territory, and it is certain that a rate adjustment of great importance, affecting a large tonnage, and most delicately balanced, was not meant to be torn to pieces in this casual, incidental, indirect fashion. The fact is that the Commission's opinion is merely an attempt to force the Illinois Central to alter its settled policy. That policy is that it will not extend junction point rates to local stations on independent short lines, unless this extension is necessary to provide reasonable rates. Other railroads in the Southeast have a different policy, but we submit that the Commission is without power to force this policy upon the Illinois Central, in the absence

of a finding of unreasonableness in the rates, and in the absence of those factors which justify a finding of discrimination.

It is said in the *Central R. R. Co. case, supra*:

> "They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so would involve departure from a policy to which they have steadfastly adhered and adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege at Newark, they would act contrary to their judgment and would adopt a practice which some connecting carriers had introduced without their concurrence or consent, and which may hereafter upon appropriate inquiry be held by the Commission to be unjust and unreasonable."

So here the rates from Knoxo cannot be reduced without the consent of the Fernwood & Gulf, a road in no way even remotely responsible for unduly preferring Fernwood and any effort of the Illinois Central to increase the Fernwood rate would almost certainly lead to condemnation by the Commission.

The Cotton Belt Case.

The Commission relies upon

St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144.

This case was referred to and distinguished in the creosoting case. It is obvious that this case deals with a situation which is altogether different from the one in the case at bar. In the *Cotton Belt case* unreasonable joint through rates were in effect from Arkansas "Blanket" territory to Paducah *via* both Memphis and Cairo. The very substance of the decision was the fact

that the Paducah rates were found unreasonable. The Court says:

> "Furthermore, the order in the case at bar is not merely one to prevent discriminations. Orders to remove discrimination, as commonly framed do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The order here complained of gives the carriers no such option. It directs that the rates to Paducah shall be 'not in excess of the rates at present in effect from the same points or groups to Cairo, Ill.' In other words, the Commission having found the 22-cent rate unduly high, reduces it to 16 cents, by establishing joint through rates. The injury resulting from discrimination was doubtless the reason which induced the Paducah Board of Trade to institute the proceedings; and the Commission may have considered the existence of the lower rate to Cairo persuasive evidence that the 22-cent rate to Paducah was unreasonably high and the resulting discrimination strong reason for establishing the 16-cent joint rate. But the order is strictly one under Sec. 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates, or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of Section Three." (pp. 144, 145.)

Fernwood & Gulf Participation in Rates from Fernwood.

It is suggested by the Commission that the Fernwood & Gulf is a party to the discrimination for the reason that this line handles traffic from Fernwood *via* its line and the New Orleans Great Northern and traffic from Tylertown and Foxworth *via* its line and the Illinois Central. But this feature provides nothing but a techni-

cal point. For it is obvious that if the Fernwood & Gulf is to get any business from any one of these three points, it must meet the competition of the trunk lines serving these points. And this fact has been recognized by the Commission, in that authority has been given to the Fernwood & Gulf to publish the junction rates from these points without reference to the Long and Short Rule of the Fourth Section of the Act. (Rec. 89). In other words, the Commission has by its orders in this matter, in effect held that there is no discrimination in the fact that Knoxo and intermediate points, carries a higher rate than Fernwood *via* the Fernwood & Gulf and connecting lines. And this Court has held in substance that the qualified prohibitions in the Fourth Section of the Act represents one special form of discrimination and preference denounced by Sections Two and Three of the Act.

United States v. *A. T. & S. F. Ry. Co.*, 234 U. S. 476,

and cases cited in that opinion. In other words, it is not conceivable that the Commission would have permitted the Fernwood & Gulf to do an act under the Fourth Section which was unlawful under the Third Section. And indeed, the decision of the Commission in this case rests upon no such theory.

Upon no view of the case, can the order of the Commission be upheld.

Respectfully submitted,

ROBERT V. FLETCHER,
Attorney for Appellant,
Illinois Central Railroad Co.

WALTER S. HORTON,
Of Counsel.

INDEX.

	Page.
Supplemental statement	1
Scope and development of litigation before the Commission	4
The litigation in the district court	6
Brief	11
Point I—Proceeding before Commission irregular	11
Point II.—Swift estopped	13
Point III.—Carrier created for self-limited service entitled to capital return under the Fifth Amendment	24
Point IV.—Gulf Company constitutionally entitled to fix rates	46
Point V.—Convertible value of money deprives appellees of property unconstitutionally, if relief granted	63
Point VI.—No authority in Commission to eliminate arbitraries on short lines by enactment of a universal order at July 2, 1919	64

Cases Cited.

Abrams v. Jones, 207 Pac., 727	38
Adkins v. Children's Hospital, U. S. Sup. Ct. Adv. Op., 1923, 440; 24 A. L. R., 1254	21
Akron, C. & Y. R. Co. v. U. S., U. S. Sup. Court Adv. Op., 1923, page 316	41, 64
Akron, etc., v. United States, U. S. Sup. Court Adv. Op., 1923, page 311	44
Armour Packing Co. v. United States, 209 U. S., 80	20
Block v. Hirsh, 256 U. S., 165; 65 L. Ed., 875	36
Bluefield, etc., v. Public Service Commission, U. S. Sup. Court Adv. Op. 1923, page 718	24, 31, 60
Board of Trade v. Abilene, 37 I. C. C., 760	38
Board of Trade v. I. C. R. R., 37 I. C. C., 709	38
Brooks-Scanlon Co. v. Com., 251 U. S., 383	31
Bullock v. R. R. Com., 254 U. S., 520	31
Burrows v. Guest, 4 Utah, 121	12
Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S., 655, 670	62
Central Railroad of New Jersey v. U. S., 257 U .S., 247	50, 56
Central Yellow Pine Association v. Ill. Cen. R. R. Co., 10 I. C. C., 505	38
Cincinnati, etc., v. Commission, 162 U. S., 197	20
Colley v. Duncan, 47 Ga., 668	12

Page.

Commercial Club v. I. C. R. R., 31 I. C. C., 40..... 38
Commission v. Railroad Company, 209 U. S., 118..... 19
Cotton Mills v. Railroad Company, 84 Miss., 339..... 20
Cybur Lumber Company v. N. O. & N. E. R. R. Co., 43 I. C. C., 271 3
Cypress Company v. Cypress Company, 65 S. E., 827..... 12

Dahn v. United States, 258 U. S., 428..... 39
Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 172..... 62

East Tennessee, etc., v. Commission, 181 U. S., 18..... 21, 50, 52
Electric Co. v. Charlton, 255 U. S., 541..... 31
Elliott on Railroads, section 1500..... 21

Finance Corporation v. Exchange Corporation, U. S. Supreme Court Adv. Op., 1923, page 757..... 60
Fla. East Coast R. R. v. United States, 234 U. S., 167..... 41
Fort Smith v. Ft. Smith, 202 Fed., 590..... 24, 34

Galveston Electric Co. v. Galveston, 258 U. S., 388..... 33
Ga. Ry., etc., v. R. R. Com., U. S. Sup. Ct. Adv. Op., 1923, 730.. 33
Georgia Ry. Co. v. Railroad Commission, U. S. Supreme Court Adv. Op., 1923, 728..... 36
Georgia Railway & Power Company v. Railroad Commission, U. S. Supreme Court Adv. Op., 1923, page 729..... 60

Hammond Lumber Co. v. Commission, 9 A. L. R., 1223; 189 Pac., 639..... 27
Hammond Lumber Company v. Commission, 9 A. L. R., 1123.... 23

Interstate Commerce Commission v. Union Pacific Company, 222 U. S., 541, 547..... 41
I. C. R. R. Co. v. Interstate Commerce Commission, 206 U. S., 441 ..... 33, 37
In re Cameron, 151 S. W., 76..... 38

Kansas City Sou. R. R. Co. v. U. S., 231 U. S., 423..... 31
Knoxville v. Knoxville Water Works Co., 212 U. S., 14..... 31
Kwock Jan Fat v. White, 253 U. S., 415, 454, 465; 64 L. Ed., 1010, 1015; 40 Sup. Ct. Rep., 566..... 11, 37

Landon v. Commission, 234 Fed., 161..... 34
League v. Railroad Company, Ann. Cas. 1914 A, 1161..... 24, 34
Lee v. Newman, 55 Miss., 365..... 15
Lincoln Gas, etc., Co. v. Lincoln, 250 U. S., 256, 268..... 62
London v. Commonwealth, 234 Fed., 161..... 24

	Page.
Lowrey v. Hawaii, 206 U. S., 222; 51 L. Ed., 1033	17
Lumber Company v. Cypress Co., 66 S. E., 116	12
Lumber Rates Fourth Section Application, 25 I. C. C., 50	38
Mercantile Lumber Company v. I. C. R. R. Co., 53 I. C. C., 688	52
Missouri ex rel. v. Public Service Com., 1923 U. S. Sup. Ct. Adv. Op., 623	32
Missouri Railroad Company v. Ault, 256 U. S., 554	39
N G Fung Ho v. White, 259 U. S., 284	11, 37
Northern Pacific R. R. v. North Dakota, 250 U. S., 135	39
Paducah Case, 245 U. S., 136	57
Philadelphia & Reading Co. v. United States, 240 U. S., 334	50, 53
Railroad Company v. Ellis, 165 U. S., 154	60
Rates on Lumber from Southern Points, Investigation & Suspension Docket, 520; 34 I. C. C., 652; Sup. Rep. 36 I. C. C., 137	38
R. R. Co. v. Mills, 253 U. S., 208	31
Richmond Switching Case, 254 U. S., 57, 62	57
St. Louis S. W. R. R. Co. v. U. S., 245 U. S., 136	50
Seaboard Air Line Ry. Co. v. U. S., 254 U. S., 57	50
Smythe v. Ames, 169 U. S., 466	36
Southern Pacific Co. v. Commission, 219 U. S., 433	64
Southern R. Co. v. Tift, 306 U. S., 428	37
Southern Pacific Company v. Interstate Commerce Commission, 219 U. S., 443	13
Summerbell v. Summerbell, 38 N. J. Eq., 293	12
Texas, etc., v. Com., 162 U. S., 197	50
Tindall v. Mills Company, 67 S. E., 908	12
U. S. v. L. & N. R. R. Co., 235 U. S., 320	50
Vandalia R. R. v. Schnull, 255 U. S., 120	31
Watts v. Buchanan, 92 Miss., 544	48
Weems Steamboat Co. v. People's Steamboat Co., 214 U. S., 345	58
Werlien v. New Orleans, 177 U. S., 403	12
Wilcox v. Consolidated Gas Company, 212 U. S., 19, 48-50	62
Wolf Packing Company v. Court of Industrial Relations, U. S. Sup. Court Adv. Op., 1923, page 758	21
Wolf Packing Company Case, supra, at page 760	22
52 L. R. A. (N. S.), 15	33
29 C. J., 284	11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 40.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL., APPELLEES.

BRIEF FOR APPELLEE FERNWOOD, COLUMBIA & GULF RAILROAD COMPANY.

Supplemental Statement.

Appellants' statement of the case needs be supplemented to accurately reflect appellee's contentions.

Originally, the Fernwood Lumber Company owned a saw mill at Fernwood, on the Illinois Central Railroad (hereinafter called "Central Company"), and acquired for milling thereat, an extensive tract of timber. To log the mill, a

railroad was constructed, as needed, from time to time, which subsequently developed into a chartered carrier, this appellee, Fernwood, Columbia & Gulf Railroad Company (hereinafter called "Gulf Company"), and in 1914, it was, by order of the Interstate Commerce Commission, eliminated from the class of a plant facility.

Until 1906, it uniformly exacted, for all lumber transported, a local rate of 5 cents per 100 pounds. In 1906, the present rate structure was initiated; the Gulf Company then named, and thereafter consistently collected, an arbitrary, for itself, of 2 cents over the junction- int rate out of which it also received a division on all traffic.

Prior to 1912, Swift Lumber Company (hereinafter called "Swift"), purchased from the Fernwood Lumber Company a portion of said timber, and covenanted with that company:

> "* * * For and in consideration of the sum of One Dollar ($1.00) cash in hand paid, the receipt whereof is hereby acknowledged and certain conditions, as hereinafter recited, the Fernwood Lumber Company * * * did lease unto the Swift Lumber Company, their successors or assigns * * * (certain real property)."

The conditions heretofore referred to are that "Swift Lumber Company, their successors or assigns, shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on and tributary to the logging railroad of the Swift Lumber Company. * * *" Tr., II; O. R., 331 (Commission's Brief, Appendix A).

Swift's only witness, Kimball, testified:

> "Q. Now is it not a fact that when you went to locate your mill at Knoxo, that the question of this

> additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber, and of whom you obtained your mill site, and that you made a written agreement with them by which you obtained your mill site and agreed as a part of the consideration to let your timber move over the Fernwood & Gulf Railroad?
>
> A. That is a fact. * * *"
>
> (Tr. 55.)

At that time the New Orleans Great Northern Railroad was at Tylertown, whereat the trunk line rate was effective. Nevertheless, Swift knowingly located at Knoxo, and, under this covenant, moved the tonnage over the Gulf Company for many years without protest. Only when over 80 per cent thereof had been so paid on, did Swift, on the suggestion of an outsider, endeavor to repudiate the covenant; hence the law suit whereof Kimball said:

> "We were informed by one of our customers that his traffic man informed him that this 2-cent arbitrary which we had been paying for a number of years was illegal, I think, was the term he used. However, I don't intend to accuse the Fernwood & Gulf Railroad of illegal practices, but he said it could be set aside." (Tr., 60.)

This rate structure had been long effective and was well known to the Interstate Commerce Commission. In *Cybur Lumber Company v. N. O. & N. E. R. R. Co.*, 43 I. C. C., 271, it was said:

> "The rates on lumber from stations on the Fernwood & Gulf Railroad * * * are made by the addition of an arbitrary of from one to two cents to

the rate from the junction point." *Cleveland Lumber Company v. A. C. L. R. R. Co.*, 52 I. C. C., 158; elsewhere *Lewis v. Railroad Company*, 47 I. C. C., 80; Shepherd testifies (Tr., 80 et seq.; Exs. 3 & 4), all timber tonnage from some short lines on the Central has now moved, nearly all of it from others, all without protest.

Scope and Development of Litigation Before the Commission.

On July 2, 1919, Swift filed petition (Tr., 18) against Walker D. Hines, Director General, making the controlled lines "formal parties defendant hereto" (Tr., 21), and original defendants, also the non-controlled lines. The Director General filed a general denial, but among other things, of General Order No. 28, said:

> "He avers it is therein by him found and certified to this honorable commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit, it was necessary to increase the railway operating revenue; also that in his opinion the public interest required a general advance in freight rates * * *; and he further avers that all rates as now in force and complained of herein have been established pursuant to and in accordance with said order" (Tr., 29).

The Gulf Company answered at length (Tr., 29-35), setting up, in addition to a general denial: (*a*) Estoppel; (*b*)

a constitutional right to capital return, and (*c*) an individual power of rate fixation coördinated with its own best interests.

The hearing occurred in Chicago, December 18-19 before Honorable J. Edgar Smith, Special Examiner; the evidence thereat appears in Tr., 36-137; and the examiner's report at Tr., 137, wherein, after personal contact with the witnesses, he recommended to the Commission to dismiss the petition, (Tr., 144), finding: (*a*) The rate reasonable, under Section 1; (*b*) non-discriminatory, under Section 3; and (*c*) denying reparation.

The cause was then argued, on exceptions filed by both sides, before Commissioners Hall, Daniels, and Woolley, May 15, 1920; the Commission being then full. The cause, however, was not decided until April 5, 1911, when Commissioner Woolley had retired and two vacancies existed; only five Commissioners concurred in the majority opinion wherefrom three Commissioners, including Commissioners Hall and Daniels dissented; Commissioner Esch did not participate—in short, eleven months after submission by a majority of five to three, this order herein sought to be enforced was entered when three of the Commission concurred with the Special Examiner holding relief inappropriate.

The hearing was during Government control; thereat it appeared that the Railroad Administration had adopted the policy of requiring short lines to plus the rates set forth thus (Tr., 98):

> "However, since the N. O. & N. E. has been under Government control, the Administration has reached the conclusion that this road should be treated the same as other short roads in the southern region—that is, by making the maximum shrinkage as pro-

vided in the Commission's tap-line decision—*and if that road feels that it is entitled to greater revenue it should obtain same by adding to the junction-point rate such arbitrary as it considers proper.*" (Italics ours.) The Commission unanimously found the rate reasonable under Section 1; and the sole basis of the majority opinion was alleged discrimination under Section 3. Petition for reargument was promptly filed and overruled.

The Litigation in the District Court.

Parties: Original Complainants and Appellees, Central Company and Gulf Company; Sole Original Defendant, United States; Intervenors, Interstate Commerce Commission and Swift Lumber Company; Appellants, United States and Interstate Commerce Commission. Swift has not filed any bond.

The Original Bill and Exhibits, Tr., 1-158. This bill delineates the proceedings and attacks the order:

I.—THE PROCEEDINGS BEFORE THE COMMISSION WERE IRREGULAR IN THIS, THAT AS AN ADMINISTRATIVE BODY, THE HEARING AFFORDED DID NOT ACCORD WITH LAW (Tr., 6 and 7, Secs. IX and X), whereof, under Point I:

II.—AN ESTOPPEL EXISTED AGAINST SWIFT UNDER EXPRESS CONTRACT ASSENTING TO THE RATE STRUCTURE CONTAINING THIS ARBITRARY (Tr., 7, Secs. XI, et seq.), whereof under Point II:

III.—THE GULF COMPANY WAS CONSTRUCTED SOLELY TO MARKET TIMBER FROM ADJACENT TERRITORY; ITS TIMBER TONNAGE IS 93 PER CENT AND WHEN REMOVED, ITS REASON FOR BEING SHALL CEASE.

Said company has outstanding $500,000.00 First Mortgage Bonds, $200,000.00 Refunding Mortgage Bonds (lawfully authorized under the provisions of the Transportation Act of 1920), $100,000.00 of capital stock (whereon no distribution of any kind has ever been made), all invested in a property solely utilized, substantially, in timber transportation, and whereon it is entitled to such rates as will fairly compensate it for service rendered and make a return of the capital so invested, valued by the valuation section at nearly $600,000.00.

"To ignore this principle would be to violate the Fifth Amendment and no public service corporation can be expected to sacrifice its property for public use without compensation therefor made, and it is entitled to earn not only what will meet current repairs, but to provide a means of replacement when it ceases to be of value" (Tr., 9). In a self-limited operation of a railroad, the carrier has a right to exact under the Fifth Amendment a capital reserve against and from the resource for the removal whereof construction was had (Tr., 8, 9, 10, Secs. XI, et seq.), whereof later under Point III:

IV.—THE GULF COMPANY SETS FORTH ITS RIGHT TO FIX RATES; ITS FIXATION OF THEM LAWFUL FOR DIVERS REASONS, AMONG OTHERS:

(*a*) The original exaction of the full local for the service until 1906 when the through rate was first established, the service being that substantially rendered in bringing to a main line carrier tonnage located at a distance therefrom (Tr., 10);

(*b*) The existence of a territory accurately admeasured wherein Knoxo was located, wherefrom there had never been a trunk line rate on a branch road, but a continuous plussing thereof (Tr., 11);

(*c*) No deviation by the Gulf Company in plussing, save, when previously thereto, therein duly authorized, by the Commission, and then only to the extent thus prescribed (Tr., 12, et seq.);

(*d*) Confiscation, contrary to Fifth Amendment;

(*e*) The inherent right as an individual railroad peculiarly situated to name its rates (Tr., 12, et seq.), whereof under Point IV;

V. "Complainants aver that for the service rendered in the transportation of lumber at the present rates, with the convertible value of money, that the rate upon lumber is lower, and to further reduce it by the elimination of the arbitrary would be to deprive complainants of their property contrary to the Fifth Amendment," whereof under Point V;

VI. Complainants aver that the Commission is here seeking to create a general elimination of individual action by short carriers, and seeking to control the rate structure, by methods outside of the power of the Commission; whereof under Point VI.

The exhibits were in large measure omitted from the printed transcript, but Exhibit A (Tr., 18) is the original petition before the Commission. Exhibit C is the testimony before the Commission which was brought into the bill thus: "Direct reference to said evidence is specifically made and

the same integrated into this bill by reference, and is not set forth at length merely to save prolixity" (Tr., 5).

Thereupon, Holmes, District Judge, being absent, Rufus E. Foster, District Judge of Louisiana, having been designated to act, a motion was properly made for a preliminary injunction (Tr., 159), which was heard before a Court composed of R. W. Walker, Circuit Judge, Wm. I. Grubb and Rufus E. Foster, District Judges, at Birmingham, Alabama, on August 18, 1921.

There the United States, the sole original defendant, filed a motion to dismiss, predicated, substantially, upon the grounds hereinafter set forth (Tr., 163). The Commission intervened, and its answer, save upon the number of Commissioners, is, substantially, a motion to dismiss, and was treated as such (Tr., 164). Swift intervened, and moved to dismiss (Tr., 166). A preliminary injunction was granted at Birmingham (Tr., 167), and issued August 19, 1921 (Tr., 169). The cause was next heard at New Orleans, under due proceedings, upon February 13, 1922, whereat it was disposed of by final decree thus:

(1). The motion of the United States to dismiss was again overruled, and leave to plead further not being asked, the cause was submitted for final decree, and as to the United States, it was set forth that complainants were entitled to relief.

(2). As to the Commission, its answer, save as herein indicated, was treated "as its motion to dismiss, which is hereby disallowed and overruled, leave to plead further not being asked, and said cause being ready for final decision, the relief hereinafter set forth is to be granted."

(3). The intervention of Swift was dismissed, and relief granted (Tr., 180).

This course was pursued because, substantially, there was and is no conflict in the evidence. From this decree, the cause comes here, and to affirm it, we submit:

POINT I. PROCEEDING BEFORE COMMISSION IRREGULAR;

POINT II. ESTOPPEL AGAINST SWIFT;

POINT III. CARRIER CREATED FOR SELF-LIMITED SERVICE ENTITLED TO CAPITAL RETURN UNDER 5TH AMENDMENT;

POINT IV. GULF COMPANY CONSTITUTIONALLY ENTITLED TO FIX RATES;

POINT V. CONVERTIBLE VALUE OF MONEY DEPRIVES APPELLEES OF PROPERTY UNCONSTITUTIONALLY, IF RELIEF GRANTED;

POINT VI. NO AUTHORITY IN COMMISSION TO ELIMINATE ARBITRARIES ON SHORT LINES BY ENACTMENT OF A UNIVERSAL ORDER.

BRIEF.

Point I.

PROCEEDING BEFORE COMMISSION IRREGULAR.

When this cause was submitted, May 15, 1920, the Commission was full; the cause was not decided until April 5, 1921, eleven months thereafter, during which time vacancies intervened, Commissioner Woolley, before whom argument was made, had retired, the two Commissioners who heard the argument dissented.

This cause is of the utmost importance; its principles destroy practices existing for years, formulated by the owners of property. Under it, their property is to be taken, their earnings reduced and a policy established abhorrent to their best interests, and contrary to that adopted by the Railroad Administration under similar circumstances (Tr., 98, 110-112).

By amended Section 17, the Act to Regulate Commerce provides: "Any person may appear before the Commission or any division thereof and be heard in person or by attorney." With this fundamental right to be heard, what did the law require of the Commission, when the only two members who heard the cause argued were unwilling to promulgate this order? 29 *C. J.*, 284, holds:

> "A hearing consists in receiving facts and the argument thereon for the purpose of correctly deciding."

Where the hearing given by an administrative body is not full and fair, this Court annuls. *Kwock Jan Fat v. White,* 253 U. S., 415, 465; *N G Fung Ho v. White,* 259 U. S., 284.

Where there was such a division between those who heard the argument and those who had not, was it competent for those who had not, by deciding as was done here, to deny to the appellee the right to be heard?

Here, especially, where one member retires, as did Commissioner Woolley, the Court must remand for reargument. *Lumber Company v. Cypress Co.*, 66 S. E., 116, holds:

> "Where a case on appeal to the Supreme Court is heard by a Court composed of four members and before the case is decided one of the Justices goes off of the Court and two of the remaining Justices are in favor of reversal and the other for affirmance, a rehearing will be ordered."

Cypress Company v. Cypress Company, 65 S. E., 827;
Tindall v. Mills Company, 67 S. E., 908;
Summerbell v. Summerbell, 38 N. J. Eq., 293;
Burrows v. Guest, 4 Utah, 121;
Colley v. Duncan, 47 Ga., 668.

The uniform rule of this Court is that its members who have not heard the argument of the case do not participate in its decision: *Werlien v. New Orleans*, 177 U. S., 403; *Shoshone Min. Co. v. Rutter, Id.*, 514; *Cin., H. & P. R. Co. v. Thiebaud, Id.*, 621, and many other cases.

Counsel contend the reduction of our argument to writing and its submission, along with the record, negatives the error; not so. If it be competent to take away the right of *personal contact* between parties with courts, the constitutional guaranty has become a mockery, the Star Chamber has returned. Where there is such sharp division of opinion, the right to be heard by oral argument by the Commis-

sion, as a Commission, is, with deference, required by the Act. Those who heard, condemned us not, while those who had not heard us, condemned us, and when this occurred, of necessity, a right to be heard by those who condemned us was a condition precedent to their right of condemnation.

Into what disrespect will law fall when the right to personally appear is denied, especially, when those judges before whom we have appeared dissent? The duty to make the law above reproach rests here. This rule should be here applied, especially because the Commission appears to have been promulgating a general policy, under the influence of prior decisions, rather than deciding our case. The Commission sought to do that which was condemned in *Southern Pacific Company v. Interstate Commerce Commission,* 219 U. S., 443. This proceeding was not under Section 15 and is only under Section 3. Appellees were not given the right personally to differentiate this case from those under which the majority was then acting. The injustice is so manifest as to be reflected in the result.

Point II.

Swift Estopped.

The motion to dismiss admits—

> "Swift Lumber Company located its plant upon the line of the Fernwood Company when the same was the property of the Fernwood Lumber Company, and thereafter when a segregation occurred by which said Lumber Company was divested from the Railroad Company, the Railroad Company, by virtue of such

diversion, became entitled to have, demand and exact that the Swift Lumber Company should do and perform its certain covenant and contract whereby it undertook and agreed to ship all of its output over said Fernwood line at rates then in effect, embracing and including said arbitrary, and that in consideration of such agreement, as appears by the exhibits to said evidence so taken, said Lumber Company received valuable rights-of-way and other property in virtue of which it is now enjoying its facilities, and which, but for its contract so thus to remove its tonnage, it would not have been allowed to become the owner of."

To demonstrate that these legally admitted averments were predicated upon full warrant, Swift introduced but one witness who swore that he knew that the rate at Knoxo was two cents higher than at Tylertown (Tr., 47):

"Did Tylertown, at the time you located your mill at Knoxo, take a rate 2 cents lower than the rate from Knoxo?

"A. Yes."

Again:

"Q. I will ask you, Mr. Kimball, to state when you went to locate your mill at Knoxo, Mississippi, weren't you familiar with the fact that this arbitrary was in existence, and that at Tylertown, at that particular time, * * * there was no arbitrary?

"A. I was familiar with that. * * *

"Q. And if your location had been upon the N. O. G. N. road, you were aware that by so locating, you would have enjoyed the benefit of the grouping rate applicable to this section?

"A. We knew that. I knew that.

"Q. Now, is it not a fact that when you went to locate your mill at Knoxo, that the question of this additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber, and of whom you obtained your mill site, and that you made a written agreement with them by which you obtained your mill site and agreed as a part of the consideration, to let your timber move over the Fernwood & Gulf Railroad?

"A. That is a fact" * * * (Tr., 55).

The Gulf Company was extended later into Columbia. This contract was made:

> "For and in consideration of the sum of one dollar ($1.00) cash in hand paid, the receipt whereof is hereby acknowledged, and certain conditions as hereinafter recited, the Fernwood Lumber Company * * * doth lease unto the Swift Lumber Company, their successors or assigns" * * * (certain property).

The covenant recited:

> "The conditions heretofore referred to are: That Swift Lumber Company, their successors or assigns shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on or tributary to the logging railroad of the Swift Lumber Company that may be offered and destined to a point upon said logging railroad or any extensions thereof."

The other conditions are largely immaterial.

A contract so made for another's benefit in Mississippi is by him legally enforceable (*Lee v. Newman*, 55 Miss., 365),

especially where, as here, at that date the promisee was a subsidiary of the party paying the consideration.

Opposite counsel quote the contract and seek to avoid it because there was "nothing said in the contract about rates." But, note the record:

> "The question of this additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber and of whom you obtained your mill site and that you made a written agreement with them by which you obtained your mill site and agreed, as a part of the consideration, to let your timber move over the Fernwood & Gulf Railroad?
>
> "A. That is a fact" * * * (Tr., 55).

Let us individualize. On the one side, there was Swift, the purchaser; on the other, Enochs, the owner of the railroad and the timber, and of those rights Swift desired to become the lessee. Therefore, when there had been a discussion of this arbitrary, a covenant for removal was made, obligating Swift to route via the line whereover the arbitrary obtained. Had it not been the intention that this should so be, and that therefrom Enochs would have derived a profit, no such consideration would have arisen. One dollar recited is not a consideration for the grant of the rights herein mentioned and of which Swift has been in possession.

For nearly ten years Swift paid this arbitrary and raised no question, not even knowing that he was being discriminated against, and we therefore insist:

(*a*) Looking to the facts and circumstances, *i. e.*, the payment, the lower court found, under the motion to dismiss, a covenant to ship at the published rate, containing this ar-

bitrary, the admeasurement of compensation being the rate then in effect. The service could not be given; compensation must have been in their minds, and when, for nearly ten years, that compensation was admeasured upon a fixed basis, it is difficult not to perceive that the payment of the arbitrary constituted the consideration moving to the Lumber Company.

The trunk line rate was in effect from Tylertown, six miles distant, and this provision was a covenant to pay that which was paid. Acquiescence in the exercise of the right, without question, estops now Swift from assailing it. Where there has been, for a period of over six years, a uniform interpretation placed upon a contract by the parties thereto by performance, such interpretation becomes the measure of the rights thereunder. In *Lowrey v. Hawaii,* 206 U. S., 222; 51 L. Ed., 1033, it was said:

> "In *Brooklyn L. Ins. Co. v. Dutcher,* 95 U. S., 269; 24 L. Ed., 410, it was said: 'There is no surer way to find out what parties meant than to see what they have done.' So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purposes. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. * * * It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires. See, for further illustration,

the following: *Ree v. Merchants' Mut. Ins. Co.,* 95 U. S. 23; 24 L. Ed., 348; *District of Columbia v. Gallaher,* 124 U. S., 505; 31 L. Ed., 523; 8 Sup. Ct. Rep., 585; *Topliff v. Topliff,* 122 U. S., 121; 30 L. Ed., 1110; 7 Sup. Ct. Rep., 1057; *Paige v. Banks,* 13 Wall., 608; 20 L. Ed., 709; *Philadelphia, W. & B. R. Co. v. Trimble,* 10 Wall., 367; 10 L. Ed., 948; *Chicago v. Sheldon,* 9 Wall., 50; 19 L. Ed., 594; *Cavazos v. Trevino,* 6 Wall., 773; 18 L. Ed., 813; *Simpson v. United States,* 199 U. S., 397, 399; 50 L. Ed., 245, 246; 26 Sup. Ct. Rep., 54; *Chicago Great Western R. Co. v. Northern P. R. Co.,* 42 C. C. A., 25; 101 Fed., 792. And many State cases could be cited." 13 *C. J.,* 546; *Candler v. Cromwell,* 101 Miss., 161.

Thus, when so construed by the parties, their construction becomes conclusive of the rights thereunder especially when, in virtue thereof, the party testified:

> "Q. So you have a 2-cent arbitrary constantly brought home to you, in other words? A. It always has to be taken into consideration. In writing letters to prospective customers who are not familiar with the conditions on our line, I make it a practice to call attention to the fact that we have a 2-cent arbitrary over the main line rate."

And while witness testifies to some confusion with reference thereto, initially he clears it up thus:

> "Q. In other words, as I understand your testimony, you were having considerable difficulty in moving your tonnage by reason of these arbitraries on the rate, and there were discussions of it, and I wanted to fix the date of those discussions." * * *
>
> "The Witness: I understand the gentleman now. These transactions occurred back in 1913 and 1914.

"Q. Since 1913 and 1914, as I understand it, you have not had any of that kind of trouble.

"A. I have taken occasion to explain our position of being under a 2-cent arbitrary and have advised them of that fact in making our quotations except, of course, those with whom we were doing business regularly and who understood conditions.

"Q. That condition obtained back in 1913 and 1914 and has not caused any friction since that date, as the parties to it understood what you were doing? A. Yes, sir; that is true."

With this admission of the basis for fixing the prices of lumber sold, all doubt as to the interpretation of the contract ends.

(*b*) But, as said in *Commission v. Railroad Company,* 209 U. S., 118:

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Interstate Commerce Commission v. Alabama Midland R. Co.,* 168 U. S., 144; 42 L. Ed., 414, 425; 18 Sup. Ct. Rep., 45, 51, quoting from the opinion in 5 Inters. Com. Rep., 697; 21 C. C. A., 59; 41 U. S. App., 466; 74 Fed., 723:
>
> " 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate com-

merce leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interest upon the same principles which are regarded as sound and adopted in other trades and pursuits.'

"It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to change of rates in the manner provided in the interstate commerce act (*Armour Packing Co. v. United States,* 209 U. S., 56; *ante,* 781; 28 Sup. Ct. Rep., 428), and also that in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense."

That such a contract is requisite, see *Cotton Mills v. Railroad Company,* 84 Miss., 339.

Where the rate is published in accordance with law, a contract to ship tonnage under a rate so published is valid. *Armour Packing Co. v. United States,* 209 U. S., 80.

This principle is established by *Cincinnati, etc., v. Commission,* 162 U. S., 197, where it is said:

"We prefer to adopt the view expressed by the late Justice Jackson when circuit judge, in the case of *Interstate Commerce Commission v. Baltimore & O. R. R. Co.,* 43 Fed. Rep., 37; 3 Inters. Com. Rep., 92, and whose judgment was affirmed by this court, 145 U. S., 263; 4 Inters. Com. Rep., 92, just quoted * * *.

See, *Elliott on Railroads,* section 1500:

> "Amount of Compensation.—The general rule is that a common carrier is bound to carry for all for a reasonable compensation, or, as is sometimes said, at a reasonable rate. The fact that some one else is charged less for a similar service may be evidence tending to show that a charge is unreasonable, but it would seem that 'charging another person too little is not charging you too much,' and that it does not necessarily follow that the rate is unreasonable merely from the fact that some one else is given a lower rate. * * * In such case if the rate has been fixed by a lawful contract, it must of course prevail, and the shipper has no other outlet, and the carrier demands and forces him to pay a higher rate than that agreed upon, the shipper may nevertheless ship his goods and recover back the excess of freight above the contract price."

See, also, *East Tennessee, etc. v. Commission,* 181 U. S., 18.

As said in *Wolf Packing Company v. Court of Industrial Relations,* U. S. Sup. Court, Adv. Op., 1923, page 758:

> "While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, it must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Childrens' Hospital,* decided April 9, 1923 (— U. S., —; *ante,* 440; 24 A. L. R., 1238; 43 Sup. Ct. Rep., 934)."

In *Adkins v. Children's Hospital,* — U. S. Sup. Ct., Adv. Op., 1923, 440, 24 A. L. R., 1254, it was held:

> "To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraints of the liberties of its constituent members."

The property devoted to public use does not become of public ownership. It is violative of the Constitution to vest in the Commission the right to admeasure discrimination not by what we do, but by what our competitors do. It stands adjudged in this case that the rate charged is reasonable in and of itself.

The fixation by the Gulf Company of this rate, in virtue of its charter powers, was lawful; but it is contended that it became unlawful because another, under different circumstances, under a different charter, actuated by different motives, saw fit to name a lower rate.

Wolf Packing Company Case, supra, at page 760, says:

> "First fully recognized by this Court in *Munn v. Ill.*, 94 U. S., 113, where it is said (p. 126): 'Property does become clothed with the public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

So, when the party knows the rate, and such rate is established, a contract to pay the published rate is valid. Thereunder, there can be no complaint by the party receiving the consideration under the third section, because such party consenting cannot complain.

Section 3, claimed to be violated, provides:

> "That it shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

When Swift, voluntarily, agreed to move this tonnage at the published rate, knowing that rate to be higher than the rate at Tylertown, upon full and adequate consideration, he cannot complain that this so thus by him done is unlawful—a crime—wherefor a penalty would be inflicted, because a person injured can determine the extent of the undue prejudice, and when he consents thereto, he cannot say that it was undue. So that, the contract so thus made for shipment at the published rates, was valid.

(c) But if no rate was contemplated by either party when the contract was made, the law would supply a reasonable rate; such a rate to be paid a carrier whose life is limited by timber removal must be greater than that appertaining to a carrier whose life is not so limited, and integrated into such a rate, must be compensation to retire capitalization. *Hammond Lumber Company v. Commission,* 9 A. L. R., 1123;

League v. Railroad Company, Ann. Cas. 1914 A, 1161; *Fort Smith Co. v. Fort Smith,* 202 Fed., 590; *London v. Commonwealth,* 234 Fed., 161.

As pointed out in *Bluefield, etc. v. Public Service Commission,* U. S. Sup. Court Adv. Op., 1923, page 718:

> "Consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risks incident to a hazardous investment."

Naught could be more hazardous than an investment of this character when, at the termination of the service, the plant must be junked.

Point III.

Carrier Created for Self-limited Service Entitled to Capital Return under the Fifth Amendment.

The Gulf Company was originally a plant facility of the Fernwood Lumber Company constructed for the removal of the timber by it owned. So that, had this ownership remained, no profit could have been realized by the Lumber Company until the cost of the Railroad had been amortized by charges continuously made against each unit of timber removed. However, the Gulf Company became disassociated from the Lumber Company, but disassociation did not change its character. Even with the arbitrary, it is now and has been operating at a serious loss. Timber composes 93 per cent of its traffic; within a time definitely fixed by the witnesses, this will be exhausted. The ground of no cause of action admitted all well pleaded facts, and among the facts so pleaded is its demise commercially, due to timber

exhaustion. So that, of record, this admission is judicially made, and made advisedly, because thereof, in the opinion of the majority, Commissioner Eastman declared (Tr., 150):

> "It is suggested that the independent short lines are likely to be abandoned with the depletion of the timber areas; but this is mere speculation."

So that the position which must be sustained is this, namely. When a carrier is constructed for the removal of specified, particularized tonnage, whose removal covers a limited period, such carrier cannot integrate into its rate structure, an arbitrary in addition to permanent railroad rates to retire capitalization at the end of operation because short lines may not be abandoned! Note the Commission did not say that this short line would not be; on the contrary, it dealt with a general principle, and dealing with a general principle, sought to apply that to this case; but in the declaration that hazard should not find expression in compensation, the Commission contravenes the holding in *Bluefields, etc. v. Public Service Corporation,* U. S. Sup. Court Adv. Op., 1923, page 718, declaring:

> "Consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risk incident to a hazardous investment."

The nature of the investment therefore admeasures reasonable compensation; that is controlling here.

This case involves the very existence of short line railroads where they have a limited service period, namely: Lumber roads, coal roads, mining roads, etc. Their financial welfare is conditioned upon an adequate revenue return based upon

a constitutional operation of the limitations incident. This principle has been by the Commission ignored.

Initially this line was a plant facility, for the removal of the timber on the Swift tract, along with other company timber; as a plant facility, against each unit of timber, when removed, there must needs have been accounted the proportionate cost incident to this railway construction. The Fernwood Lumber Company could never have made a profit, nor correctly kept its accounts, had it not, against *each timber unit* removed, charged the proportionate cost of railroad construction, so that when all timber had been cut, there would be returned to those investing, the cost of the railroad constructed along with other capital realization. The policy pursued by the Department of Internal Revenue in the Timber Questionnaire specifically demonstrates the point. There must needs be replacement of the capital invested in this railroad (less junk value) before a profit can be realized. It is not unjust to exact of those who enjoy the fruits arising from this railroad line that they be called to pay the cost accruing.

After construction of the line by Fernwood Lumber Company, a portion of its timber was sold, while the Gulf Company was still in the plant facility Tap Line class, and the covenant as to removal was made expressly by it. Thereafter, the Gulf Company ceased to be a tap line; became an independent carrier, but the change in the form of its property ownership did not in any way vary its fundamental character of service, nor the amounts which were requisite to be realized from timber tonnage towards capital retirement. The fact that it had become a public service corporation in nowise relieved those who would use it, as such,

from making compensation to its owners commensurate with the character of the service rendered. Yet, notwithstanding, the Commission disregarded this contention, though the construction for this purpose was admitted. Had the Fernwood Lumber Company continued to be the owner of this timber, and utilized, as was requisite, this road for its removal, although a chartered carrier and the ownership was widened by stocks and bonds the entire cost of this road, less its junk value, must needs have been charged against operation, though so induced. Therefore, when other parties—the general public—became the owners of the securities of this carrier, created specifically for the removal of transitory timber tonnage, fixed in amount, it was requisite that those who should so utilize it should contribute, from each timber unit removed, the cost proportion properly allocatable from road construction, so that when all timber was removed, there would be a capital replacement commensurate with the original investment.

The tonnage to be removed is fixed, is temporary, and when removal is complete, the public service will be ended. Swift demanded removal of this tonnage, and demanding removal of it to the mainline carrier, cannot, with deference, exact the performance of this obligation without making a contribution to the short-line carrier adequate to compensate it for the service rendered. In *Hammond Lumber Co. v. Commission*, 9 A. L. R., 1223; 189 Pac., 639, Mr. Justice Burnett said:

> "The principal grievance voiced by the plaintiffs is that the Commission considered as one of the elements, in making up the rates which the railroad company was entitled to charge, the amortization of

the reasonable value of the plant of the company, and, as incidental to that, reckoned the discount upon the bonds of the company which it sold at 5 per cent less than par to obtain funds with which to build the road. It is contended by plaintiffs that all the shipper is required to pay is for carriage of its products a sufficient amount to cover a reasonable rate of interest on the value of the plant employed in the carriage. For the defendant it is maintained that the company, as time goes on, is entitled to charge such a rate as will not only afford a fair return of interest on the value of the plant, but will provide for and absorb the depreciation of the property under all the circumstances of the particular case. The carrier devotes its private property to public service, but it is none the less on that account within the protection of the Constitution that such property shall not be taken for public use, nor the particular services of any man demanded, without just compensation. Or. Const., art. 1, sect. 18. Thus to devote its property means that it gives to the public the right or option to demand its service or the use of its property, but this is always subject to the condition of just compensation. Neither the public nor any of its component parts is compelled to exercise this right or option, but, if it is exercised, it can be only under the attendant constitutional condition. It is said that a shipper should not be compelled to buy the company's railroad. But it is equally true in principle that the company is entitled to such rates as will fairly compensate it for the service rendered, and for depreciation of its plant employed in such service, even though it reaches the vanishing point. In other words, the company ought to be allowed to come out even, in an undertaking which may reasonably be expected to exhaust itself, and, besides

quitting whole, to receive a fair compensation for its services. The carrier ought not to be compelled to sacrifice its plant, and be content merely with compensation amounting only to interest on its value. To ignore this principle would be to violate the constitutional inhibition already quoted. A public service corporation cannot be expected to sacrifice its property for the public good. Nor is it bound to see its property gradually wasted by wear and decay, without making provision for its replacement. It is entitled to earn enough not only to meet the expenses of current repairs, but also to provide means for replacing the parts of the plant when these can no longer be used. *Cedar Rapids Gaslight Co. v. Cedar Rapids,* 144 Iowa, 426; 48 L. R. A. (N. S.), 1025; 138 Am. St. Rep., 299; 120 N. W., 936. The whole subject involved in this litigation is ably and exhaustively treated in the note to *Kansas City Southern R. Co. v. United States,* 52 L. R. A. (N. S.), I.

"There was testimony before the Commission to the effect that almost the only freight that could be carried by the railroad company consisted of the logs cut from the timber in a restricted section in Columbia county, amounting to about 2,000,000,000 feet, and that when this was exhausted the plant of the company would have only a scrap value. In other words, aside from the junk value of the plant, it would perish in the using. The doctrine that the shipper should be required to pay such a rate as would not only yield a reasonable return on the value of the property, but also provide for absorbing its depreciation, is abundantly established in cases involving roads which are permanent in their character and which may reasonably be expected to have a flourishing traffic perpetually, or at least as long as

carriage by railroad shall continue in vogue. The precept is equally applicable to a road the activity of which is circumscribed by the fact that freight available for it will be exhausted in the near future. The principle is the same, and the two cases differ only in the degree and rapidity of depreciation. A fully equipped railroad, built on a circle within a radius of a hundred miles from the North Pole, would be, at the present day, utterly valueless. There would be no traffic for it and nothing to use it for. Differing only in degree would be a railroad running into a logged-off barren, where there was nothing for it to haul and no use to which it could be put. There was testimony from which the Commission could arrive at the conclusion that this would be the fate of the railroad here involved, in the near future. It was within the scope of the Commission's authority to establish such a rate as would amortize this depreciation, as well as to yield to the carrier a fair return for its services. To hold otherwise would be to say that, when an individual or corporation devotes property to public uses, it amounts to a voluntary sacrifice or thank offering on the public altar. Under our Constitution no such gratuity is contemplated. In proper cases, under the law of eminent domain, the public may condemn and take the property of a private concern, of course accompanied by an award of just compensation. The individual may voluntarily devote his property to the public service, without awaiting condemnation, granting to the public the option of taking it and using it, but only on the condition that such remuneration shall be afforded as will enable the individual to come out even."

Here, the user consumes the property, and consuming must therefore be charged. The exhaustion of the timber

is not subject to the control of the carrier. Its owners control that. Therefore, the period of the Gulf Company's usefulness is conditioned by the utilization of the timber owners. No person can be deprived of property without due process of law, nor can the railroad be compelled to operate when its operation, at the prices allowed, consumes its invested capital. *Brooks-Scanlan Co. v. Com.*, 251 U. S., 383; *R. R. Co. v. Mills*, 253 U. S., 208; *Bullock v. R. R. Com.*, 254 U. S., 520; *Vandalia R. R. v. Schnull*, 255 U. S., 120; *Bluefield v. Com.*, U. S. Sup. Ct. Adv. Op., 1923, p. 718.

Return of capital in a self-limited operation is an inherent right of property; without the recognition of such a right by a State, or by the United States, there would be a deprivation of property without due process of law. *Kansas City Sou. R. R. Co. v. U. S.*, 231 U. S., 423, where there was quoted with approval *Knoxville v. Knoxville Water Works Co.*, 212 U. S., 14.

As said in *Electric Co. v. Chariton*, 255 U. S., 541:

> "Two propositions are indisputable: (*a*) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations (*Reagan v. Farmers Loan & T. Co.*, 154 U. S., 362; 38 L. Ed., 1014; 4 Inters. Com. Rep., 560; 14 Sup. Ct. Rep., 1047; *Smyth v. Ames*, 169 U. S., 466; 42 L. Ed., 819; 18 Sup. Ct. Rep., 418; *San Diego Land & Town Co. v. Jasper*, 189 U. S., 439, 442; 47 L. Ed., 892, 894; 23 Sup. Ct. Rep., 571; *Knoxville v. Knoxville Water Co.*, 212 U. S., I, 17; 53 L. Ed., 371, 381; 29 Sup. Ct. Rep., 148; *Willcox v.*

Consolidated Gas Co., 212 U. S., 19, 41; 53 L. Ed., 382, 395; 48 L. R. A. (N. S.), 1134; 29 Sup. Ct. Rep., 192; 15 Ann. Cas., 1034; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S., 352, 434; 57 L. Ed., 1511, 1555; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 729; Ann. Cas., 1916 A, 18; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S., 655; 56 L. Ed., 594; 32 Sup. Ct. Rep., 389; *Des Moines Gas Co. v. Des Moines*, 238 U. S., 153; 59 L. Ed., 1244; P. U. R., 1915 D, 577; 35 Sup. Ct. Rep., 811; *Denver v. Denver Union Water Co.*, 246 U. S., 178, 194; 62 L. Ed., 649, 662; P. U. R., 1918 C, 38 Sup. Ct. Rep., 2178)."

Again in *Missouri ex Rel. v. Public Service Com.*, 1923, U. S. Sup. Ct. Adv. Op., 623, it is declared:

> "It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.*, 291 Ill., 209, 234; P. U. R., 1920 C, 640; 125 N. E., 891:
>
> "'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.'"
>
> *Southern Pacific Co. v. Commission*, 219 U. S., 443.

See also *Ga. Ry., etc., v. R. R. Com.*, U. S. Sup. Ct. Adv. Op., 1923, 730; *Galveston Electric Co. v. Galveston*, 258 U. S., 388, wherein, at page 399, the phrase "depreciation annuity" is utilized, directly expressing this very conception,

Note the principle applicable in *I. C. R. R. Co. v. Commission*, 206 U. S., 441, where, at page 462, this Court said:

> "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. * * * The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape."

In 52 L. R. A. (N. S.), 15, will be found a note covering depreciation, instancing how it has been dealt with, both by this Commission and by State commissions, and especially instancing how it should be accounted where there is an expiring franchise, page 38, where that author said:

> "In addition to these causes, however, there may also be loss due to the expiration of the franchise. If it is one for a limited term, say twenty-five years, and, by reason of proper charges to depreciation the investment is kept intact, the company will nevertheless suffer loss if the right to use the streets is not

> renewed. The plant will be worth merely its scrap or second-hand value, less the cost of breaking it up, and restoring the highway to its original condition. Under a perpetual franchise it would be impossible to estimate the life of the property only approximately; but if the franchise is for a limited period, and granted with the understanding that it is not to be renewed, and there is a provision that the property of the company in the streets is to revert to the municipality without cost at the end of the term, the length of life of the plant is certain, and sufficient rates must be charged to permit the company to receive back the principal of its investment at the expiration of the franchise."

League v. R. Co., Ann. Cas., 1914 A, 1161, says:

> "Every car of ore hauled over them lessens their span of life, for their supply of traffic depends upon the mines, which sooner or later become exhausted, when the industries carried on about them and the roads themselves must pass away."

In *Landon v. Commission*, 234 Fed., 161, there was a large lot of pipe laid at large expense requisite to market the output of a self-limited natural gas field and there the right to capital return was expressly recognized.

Nothing will be more analogous than the exhaustion of timber, and just as it was with gas, so will it be here, and each carload of timber taken from the total must be taxed to keep from depriving the owner—the carrier—of property without due process of law.

Again, in *Fort Smith Co. v. Ft. Smith*, 202 Fed., 590, the Court said:

"It is alleged in the bill, and testimony was produced by the plaintiff to show, that the field from which plaintiff obtained its supply of gas is becoming exhausted. On cross-examination by counsel for the city one of the witnesses was asked whether the determination of the question of the quantity of gas in the field was not speculative. The witness answered in the affirmative. Upon that answer counsel for the city urged that the company was not warranted in increasing its price because of the uncertainty of the fact of the exhaustion of the field. There does not seem to be any force in that argument. The logical conclusion from the uncertainty with regard to the question of supply is directly opposed to the argument made. In the case of the *Kennebec Water District v. Waterville,* above cited, the Court said:

"'There is another matter which we think may fairly be conceded in connection with the reasonableness of rates. We think something may be allowed in this respect for the risks of the original supply, if there were any. It is common sense that those who invest their money in hazardous supplies may reasonably be entitled, for a time at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning.'

"Uncertainty in any venture is always an element to be considered in fixing a price upon the product or result of that venture.

"The allegations of the bill and the testimony warrant the issuance of a temporary restraining order on the ground of the failure of the council to make the investigation required by the laws of the State. *Silver v. Louisville & Nashville R. Co.,* 213 U. S., 175; 29 Sup. Ct. Rep., 451; 53 L. Ed., 753."

The record in this cause shows beyond controversy the critical condition in which this carrier will be plunged, and we can but rely upon what was said in *Block v. Hirsh,* 256 U. S., 165; 65 L. Ed., 875:

> "There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush,* 251 U. S., 182, 187; 64 L. Ed., 215, 219; 40 Sup. Ct. Rep., 113. Protection to it has been regarded as a vital principle of Republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581. Our social system rests largely upon its sanctity, 'and that state or community which seeks to invade it will soon discover the error in the disaster which follows.' *Knoxville v. Knoxville Water Co.,* 212 U. S., I, 18; 53 L. Ed., 371, 382; 29 Sup. Ct. Rep., 148."

When Swift thus invades the property right and takes from the bondholders of this corporation that which constitutes the only value allocatable to their property without compensating them therefor, there has been a physical invasion. If, under the ruling of the Commission, an actual test is requisite, we point to the Brooks-Scanlan Railroad, our neighbor on the south, and to the Liberty-White Railroad, our neighbor on the north, both of which, when they had moved their tributary timber tonnage, went to the junk heap with a loss to all concerned, because they had failed to account properly. The necessity for a reserve to restore capital has been impliedly, if not expressly recognized in every case from *Smythe v. Ames,* 169 U. S., 466, down to *Georgia Ry. Co. v. Railroad Commission,* U. S. Supreme Court Adv. Op., 1923, 728.

The laws of accounting but reflect the underlying principles upon which business must be done, and in this cause, there is presented sharply the question as to whether the Commission has power to disregard, as speculative, this principle. When the Commission fails to reckon correctly a principle of law, it thereby therefore becomes subject to review. It has failed to accord to that which is inevitable, namely, time limitation of a self-limited service, and has so far disregarded the law as to make its order void.

In *N G Fung Ho v. White,* 259 U. S., 284, the Court declared:

> "Courts have no power to interfere unless there was either denial of a fair hearing (*Chin Yow v. U. S.,* 208 U. S., 8; 52 L. Ed., 369; 28 Sup. Ct. Rep., 201), or the finding was not supported by evidence (*Am. School v. McAnnulty,* 187 U. S., 94; 47 L. Ed., 90; 23 Sup. Ct. Rep., 330, or there was an application of an erroneous rule of law (*Gegiow v. Uhl,* 239 U. S., 3; 60 L. Ed., 114; 36 Sup. Ct. Rep., 2)."

See, also, *Kwock Jan Fat v. White,* 253 U. S., 454, 465; 64 L. Ed., 1010, 1015; 40 Sup. Ct. Rep., 566.

In this cause, we must sustain this legal principle only to the extent that it is an applicable principle of law which was disregarded by the Commission in its judgment, and of this, there can be no doubt.

But, said counsel, "the order does not require the reduction of any rate," and therein counsel errs. No one question has been subject to greater litigation before the Commission than the matter of lumber rates from this territory. *I. C. R. R. Co. v. Interstate Commerce Commission,* 206 U. S., 441; *Southern R. Co. v. Tift,* 206 U. S., 428, where an attempt to

raise rates on lumber 2 cents was condemned as unreasonable, *per se,* by the through carriers, whereas, as to Fernwood, Columbia and Gulf, the rate has been held reasonable. That the trunk lines cannot raise their rates is demonstrated by the cases of *Central Yellow Pine Association v. Ill. Cen. R. R. Co.,* 10 I. C. C., 505; *Rates on Lumber from Southern Points, Investigation & Suspension Docket,* 520; 34 I. C. C., 652; Sup. Rep. 36 I. C. C., 137; *Board of Trade v. I. C. R. R.,* 37 I. C. C., 709; *Board of Trade v. Abilene,* 37 I. C. C., 760; *Lumber Rates Fourth Section Application,* 25 I. C. C., 50; *Commercial Club v. I. C. R R.,* 30 I. C. C., 40.

Opposite counsel seek to confess and avoid for divers specious reasons.

(*a*) Resort should be had, say counsel, to the Commission for an increase in divisions, but the Commission has prejudged our case, and refused our cause by declaring this demand is predicated upon "mere speculation" (Tr., 150), and, hence, not ground for relief.

Compelling a litigant to appear before an administrative body which has prejudged his case at a prior time, decided it against him, does not comport with the Constitution. *Abrams v. Jones,* 207 Pac., 727.

As declared in *In re Cameron,* 151 S. W., 76:

> "Beyond question, it is not according to due course of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice."

(*b*) This petition before the Commission was filed July 2d, 1919, when the carriers were under Government control, and defendants were being operated by the United States as a war-time necessity. The Railroad Administration (Tr., 98), acting for the Government, determined that this arbitrary should be the sole method of creating additional revenue for the short lines and, with the utmost deference, as at that date, the Commission was incompetent to make an order under which the policy of the Government through the Railroad Administration would have been embarrassed, as under this record, no attention whatever being given to the express provisions of the Federal Control Act. Therefore, when the Railroad Administration thus dealt with the short lines, as a matter of national preservation, the Commission had no authority to subvert that which was deemed requisite for the public welfare and as to this matter the Government was not coercible.

The trunk line carriers in this cause appear merely as "formal parties" (Tr., 21). "That said 'controlled line' railroad companies as so operated, which complainant asks be considered *as formal parties defendant* hereto."

During Government operation, the carriers as such were not responsible for the rates then obtaining. *Dahn v. United States,* 258 U. S., 428; *Missouri Railroad Company v. Ault,* 256 U. S., 554; *Northern Pacific R. R. v. North Dakota,* 250 U. S., 135.

In addition, under the Federal Control Act of March 21, 1918, Section 10, Fed. Stat. An., p. 763, expressly declares:

> "That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifi-

cations and practices, by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices, shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition."

"After full hearing the Commission may make such findings and orders as are authorized by the Act to Regulate Commerce, as amended, and said findings and orders shall be enforced as provided in said act, provided, however, that when the President shall find and certify to the Interstate Commerce Commission that any order to defray the expenses of Federal control, an operation fairly chargeable to railway operating expenses * * * it is necessary to increase the railway operating revenues, the Interstate Commerce Commission, in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said

finding and certificate by the President together with such recommendations as he may make," and this is precisely the answer herein filed (Tr., 28).

There was no objection made to the rates established by the Director General and no action had by the Commission thereon, unless this proceeding could, erroneously, be treated as falling under Section 10.

The evidence has relation to the interrelation between the Railroad Administration and the petitioner as of July 2, 1919, and it is not a proceeding under Section 15 in any aspect. There is not in this record one line of evidence dealing with any subsequent development, whereunder the controlled lines were later returned to their owners, and it is thoroughly well settled: "An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S., 541, 547; *Fla. East Coast R. R. v. United States*, 234 U. S., 167." *Akron, C. & Y. R. Co. v. U. S.*, U. S. Sup. Court Adv. Op., 1923, page 316. Therefore, in this cause, the evidence relates not to the rate structure of independent corporate carriers, but attacks solely the rate structure existing during Federal Control, and this evidence is directed thereto, and the Commission, in failing to proceed in accordance with Section 10 of the Federal Control Act, clearly violated its statutory obligation.

(*c*) But, assuming the foregoing to be in error, yet, nevertheless, the condition of the carriers did not warrant this relief. The only two connections of the Gulf Company were the N. O. G. N. Railroad, and its witness testified as to conditions then obtaining thus:

"The New Orleans Great Northern Railroad in the first nine months of 1918 earned 107.7 per cent of its compensation. By compensation, I mean what the United States Railroad Administration, or the United States Government, allowed us for the use of our railroad during the war time.

"For the same period of 1919, we have only earned 12.5 per cent, showing a deficit of 87.5 per cent for that railroad.

"That should clearly show that the New Orleans Great Northern Railroad is not in any position to allow the Fernwood & Gulf * * *, any greater allowances out of the junction point rate, if the Commission should decide that was a proper basis of rates from those stations; and if they did require a greater proportion, or rather demand that, or if the commission even went into the feature of divisions and stated that the trunk lines would have to allow them, we would have to withdraw from the business."

This evidence is uncontradicted. On the contrary, after a few formal questions, this witness was dismissed, and, of course, it was admitted by the motion to dismiss.

Turning to the record, as to the Central Company (Tr., 110), we find:

"Q. I will ask you whether or not your railroad is in position to make any additional allowances and absorb these arbitraries?

"A. No, sir, * * * and we certainly are not prepared to allow them anything in addition to that.

"Q. Your earnings are not such as to justify any additional allowances?

"A. That is correct.

"Q. If you were called on to make additional allow-

ances, state what would be the effect as to an advance or not in rates.

"A. What do you mean by an advance or not—in rates?

"Q. Whether you would not have to advance the whole lumber rates if you had to make additional allowances to the short lines?

"A. That would be absolutely necessary, because we could not afford to allow them any additional earnings out of the present rates" (Tr., 110, 111).

The amount of this general reduction in rates, as at that time, would have been tremendous (Tr., 111). Again (Tr., 116):

> "The second point I wanted to convey was that our returns today are such that we could not even consider increasing our shrinkages to any of these roads."

This was on cross-examination by Mr. Palmer, counsel for petitioner, and with this answer he rested content, and did not see fit to go into details. There was no evidence before the Commission authorizing the assumption that the Commission could allow additional compensation because as to one carrier, its returns were only 12.5 per cent of normal, as shown by the returns to the Commission, and as to the other carrier, in the same territory, while the specific proportion is not given, it would not be amiss to assume that the loss in revenue was equally disastrous. Therefore a resort to the Commission to divide that which substantially had no existence would force both carriers to withdraw from this business and to leave Knoxo without through rates. The petitioner must first show there was something to divide before a division may be called for.

(*d*). This averment of want of adequate revenue is made by the bill, and, must be on this hearing, accepted as true.

But, for the moment, let us assume that the Gulf Company does not become a part of a through transportation system, as the Commission says it may. There will have been no expenditure of the reserve so created for capital retirement and the Commission, in allowing this reserve to be created may prescribe such terms therefor as to adequately safeguard the rights of the public. Whether it will be destroyed, or not, will be known in a few years. They may earmark each dollar so thus received, and should this company become part of a through line, then of necessity, forthwith, it would not be entitled to such a reserve, and immediately the recapture clause of the Transportation Act would become applicable.

As pointed out in *Akron, etc., v. United States,* U. S. Sup. Court Adv. Op., 1923, 311:

> "The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this, two new devices were adopted; the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system

> to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable."

With this express provision for recapture of surplus, if that which the Commission said might happen, did happen, then these earnings would forthwith be recaptured from the reserve for the public benefit. In this case, the Commission required the Gulf Company to continue upon the hypothesis that it may, contrary to the uncontradicted evidence, continue as a carrier until it should die; and then, at its death, it would be solemnly declared that it should have been allowed to make the capital return as above pointed out. It would be too late. *Post mortem* examinations may benefit science but never the corpse. Our contention is, that the 5th Amendment gives us the right to set up this reserve, under the admissions, shown to be true by the evidence in this cause, especially, when, if it is set up, the condition of its utilization can be prescribed by the Commission. If the condition, which the Commission says is possible, should occur, then, the recapture clause would turn this fund over to the United States. The Gulf Company would be compelled to forego that to which the evidence shows it is entitled, upon the hypothesis that the unexpected may happen. Property rests, under the Constitution, upon no such precarious predicate and where, as here, all parties may be adequately protected, protection must be given. This recapture clause, however, is not absolutely essential to justice, because the Commission could prescribe the terms otherwise, and make such terms as would, effectually, prevent utiliza-

tion for purposes other than that set up in the creation of this fund.

When the Gulf Company is admonished of the necessity of such an accounting by the death, bankruptcy, of its neighbors, it would be the most refined cruelty to compel it, consciously, to continue to sacrifice its property upon the altar of the public without requiring compensation to be made. So long as this consciousness was not present, so long as this inevitable destruction was not appreciated, the reserve was not set up by reason of ignorance, and as to that we cannot grind with the water that has passed, but with that which is yet to come, we may grind, and grind, effectually, in accordance with the Constitution.

Swift—his mill—Knoxo—have all disappeared; but the wrong that will be wrought to the Gulf Company, unless it be allowed to set up a reserve to preserve its property under the Constitution, will paralyze the protecting power of that instrument upon which its life and its property rests.

Point IV.

Gulf Company Constitutionally Entitled to Fix Rates.

Swift owned timber not located upon a main line carrier; in order to move that tonnage to market, Swift must overcome the disadvantage of place, inherent in his timber, and he frankly admitted (Tr., 58):

> "Q. You would not tell the Commission, would you, that these disadvantages which you have enumerated did not find expression and were not indi-

cated (integrated) in the price that you paid for this timber?

"A. I have just stated that these disadvantages and the fact that the timber was away from the railroad did influence the price. We bought it as cheaply as we could and these things influenced the owner of the timber to accept a lower price than they would if that timber had been standing close to a railroad where it could have been logged at less expense." (Tr., 59.)

Hence, in acquisition, Swift obtained this advantage in price from appellee's privies in estate, and thereby, in equity, should be required to transport the timber to the railroad at his own expense, so as to be on a parity with his competitors. A difference of two cents did not preclude him from sales of his tonnage. At one time more severe differentials existed, wherein consider:

"Now, with reference to the impossibility of competing with a two-cent differential, please state to the Commission whether or not it is not a fact that in a former case, there was a difference in the rate on lumber hauled in a flat car over the rate on lumber hauled in a box car of sometimes as high as 7 cents, and it was subsequently reduced to 3?

"A. My recollection of that, Mr. Green, is just the opposite; that is, the flat car rate was lower than the box car rate.

"Q. All right.

"A. That is my recollection." (Tr., 103.)

The condition of the carrier, the Gulf Company, was such that (Tr., 148):

"The Fernwood & Gulf shows that it has operated at a loss and that the loss would be greater if its reve-

nues on lumber were reduced by the amount of the arbitrary, since lumber supplies 93 per cent of its total traffic."

Such is the finding of the Commission. It appears that prior to 1906, the Gulf Company charged those owners of timber adjacent to its line 5 cents per hundred pounds for transporting the lumber from that timber to the through line of railroad—thus overcoming the place disadvantage incident to the property ownership of timber so located. This duty of so overcoming this disadvantage appertained to the owner, and if he required another for him to so overcome, and that other was a common carrier, therefor he must pay that common carrier a reasonable rate.

Initially this obligation of transportation to the through line carrier existed upon the owner, and he could not get his timber converted into cash until he, at his own expense, hauled his lumber from the point where he had bought it to the point where the more high priced timber was—upon the trunk line. To thus overcome was his own burden, to be borne at his own expense, and, with deference, to be borne without crying because he had chosen to make the purchase on a more economical basis for this precise reason. Thus, owning timber, so circumstanced, wherefore he must pay for transportation to the through line, it is not unjust or discriminatory to compensate the temporary carrier, short-lived, with a single tonnage to move, for doing that which, without that carrier, the owner must have done for himself.

This rate structure was not new; Swift knew all about it when he purchased, and having purchased, as said in *Watts v. Buchanan,* 92 Miss., 544:

> "However, we need not bother about this, but prefer to plant ourselves in this particular case before us * * * on the language of the New York Court that, 'that kind of plunder which holds on to property, but pleads the doctrine of *ultra vires* against obligation to pay for it, has no recognition or support in the laws of this State."

Swift came into possession of this timber through a purchase from those in privity with the former owner of this company, and he holds the profits realized from the manufacture thereof reflected in its then location, and has never sought to return the consideration. The condition of this line is accurately pointed out by Mr. Fush, its general auditor. It had not set up any depreciation upon its road bed; its ties were worn out.

> "Q. In other words, three out of every four of your ties, in the normal course, would need replacing now?
> "A. Correct." (Tr., 126.)

The bridges had depreciated and wrecks were frequent, and the company had bills payable of $20,000.00 for purposes of current expenses (Tr., 127, 128), which were absorbed in large measure by a serious wreck occurring just at that time. There can be no dispute as to the need of revenue, and no dispute that this rate structure had been in existence under a fixation made by this company since 1906, and no dispute that Swift located upon this line and covenanted to ship his tonnage at this rate.

It is contended, first, that under Section 3, the order of the Commerce Commission precludes this court from finding to the contrary, citing, *Seaboard Air Line Ry. Co. v. U. S.*,

254 U. S., 57; *U. S. v. L. & N. R. R. Co.*, 235 U. S., 320: *St. Louis S. W. R. R. Co. v. U. S.*, 245 U. S., 136. But where, as here, the facts are undisputed, the question is one of law for the Court. *Central Railroad of New Jersey v. U. S.*, 257 U. S., 247; *Philadelphia, etc., v. U. S.*, 240 U. S., 334; *East Tennesse, etc., v. Commission,* 181 U. S., 18; *Texas, etc., v. Com.,* 162 U. S., 197; and even under the cases, *supra,* relied upon by appellant, the order must be reasonable and not arbitrary as is the case here.

Again, it is contended that by participation in traffic from Fernwood, Foxworth and Tylertown, under the group rates named by competitors, Gulf Company is precluded from questioning the order of the Commission, even though the order expressly finds that the rate, including the arbitrary, is reasonable for the service rendered, and the finding of reasonableness includes the allocation of the 2 cents additional to the Gulf Company as its own. This fact must not be overlooked because the interrelation between the Gulf Company and the arbitrary was expressly pointed out and adjudicated. As to Fernwood, Foxworth and Tylertown, the Commission granted Fourth Section relief, holding that these rates were thus lawful, and solely in virtue of the permission of the Commission were these rates lower than its reasonable rate charged and collected. In short, it was not until the Commission itself had approved this that they were so named.

The Gulf Company did not name these rates voluntarily, but only to participate in the business originating which otherwise would have moved via the trunk line. Had it sought to collect its arbitrary, no one would have patronized it for obvious reasons, but if it is called upon to elect, it elects to forego the business at Fernwood, Tylertown, and Foxworth, and to name the rate to include its arbitrary.

Section 3 makes its violation a crime, but meeting competition with the Commission's permission is not criminal. The case against the Gulf Company consists in showing that the Central Company publishes one rate, whereas the Gulf Company, in common with the many other short lines connecting, eight in number, publish higher rates from their local stations. The Commission, contrary to the decisions of this Court, makes the criterion for the Gulf Company's rates those upon the Mississippi Central, which were extended back on that line through the Southern Railway, as frankly pointed out by opposite counsel, at page 5 of his brief; this removes discrimination. But, beginning in 1906 and continuing to the present, Gulf Company has named its own rate, plussing the junction point with its own arbitrary, in virtue of individual right. Long acquiescence so sanctions a practice and makes it unassailable. Laches preclude relief in favor of Swift.

The fundamental proposition, which the Commission overlooks, is that the obligation to get this timber to the main line rested on Swift; when he hired another to relieve him of this obligation he must pay that other a reasonable compensation, commensurate with that which he would have individually incurred had he personally performed. Section 3 does not make every preference or advantage unlawful, but it is only those which are "undue and unreasonable." That act says:

> "It shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever."

If, as held, the rate, including the 2-cent arbitrary from Knoxo, is a reasonable rate, the shipper has no ground for complaint. It could not be undue and unreasonable preference.

This arbitrary belongs to the Gulf Company, and no other company at any time, or at any other place has ever directly, or indirectly, participated therein to any extent whatsoever. This arbitrary is its own property, and has been its own property constantly since Swift agreed to pay it. Receiving did not cause discrimination. *Mercantile Lumber Company v. I. C. R. R. Co.,* 53 I. C. C., 688, was a much stronger case than the case at bar. That for which the arbitrary is exacted is the transportation by a short lived carrier to the main trunk line. The Illinois Central does not name this rate, and does not participate in the arbitrary which the Gulf Company receives.

Section 3 came under construction in *East Tennessee, etc., R. R. Co. v. Com.,* 181 U. S., 18, where it was said:

> "The prohibition of the third section when that section is considered in its proper relation is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it can-

not be that the availing of this right is the cause of the preference; and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination."

Again, in *Philadelphia & Reading Co. v. United States,* 240 U. S., 334, the Allentown Portland Cement Co. alleged that this railroad operated the only line reaching its Evansville plant, and, in connection with the other defendants, transported cement therefrom to many other points, including Jersey City, and that the rate, $1.35 per ton, charged to the latter place was unlawful under sections I and 3. The reasonableness of the rate in section I was found; but the Commission said:

"That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate via these various routes is $1.35. Certain of the carriers which receive this Evansville cement from Philadelphia & Reading at Allentown also serve other mills in the same general vicinity as Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district. (31 *Inters. Com. Rep.,* 277.)

"Evansville is situated in the Lehigh district and is one of the numerous cement-producing points in that district located within a radius of perhaps 20 miles of each other. None of these mills, however, are reached by the Philadelphia & Reading, they be-

ing served by the Central Railroad of New Jersey or Lehigh Valley direct, or by short lines of railway which connect with these carriers at distances of from one to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading, the rate to Jersey City from these competing mills on other lines is 80 cents. * * * On shipments to Jersey City for transshipment by water to points in the Southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills, and this equality of Evansville with the other mills is maintained on traffic to Philadelphia, Baltimore, New York and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

"The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth Street totaling less than the $1.40 rate to New York proper plus the trucking charge to same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third Street, which is the greatest cement-consuming district. North of Ninetieth Street complainant can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant cannot sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate.

"It cannot be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in

competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it cannot participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of the opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist (27 *Inters. Com. Com. Rep.*, 448)."

This quotation is from the opinion of the Commission. In concluding its opinion, *avoiding the order,* the Court said:

"If a universal rate of $1.35 could not be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because,

> failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to 'any undue or unreasonable prejudice or disadvantage.' "

The leading case recently decided upon this subject is *Central Railroad of New Jersey v. United States,* 257 U. S., 247, where precisely a similar condition obtained, and this Court held that participation in joint rates did not make carriers partners:

> "They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn Ref. Co. v. Western New York & P. R. Co.,* 208 U. S., 208, 221, 222, 225; 52 L. Ed., 456, 462, 463; 28 Sup. Ct. Rep., 268. Compare *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission,* 181 U. S., I, 18; 45 L. Ed., 719, 725; 21 Sup. Ct. Rep., 516. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford to carriers the assurance that they were not in some way violating the provisions of Section 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, February 28, 1920, chap.

> 91, 41 Stat. at L., 456, nor any earlier amendatory legislation, has changed, in this respect, the purpose or scope of Section 3."

There is nothing in the *Paducah Case,* 245 U. S., 136, that in any way is inconsistent with these three decisions of this Court. Primarily, that case involved Section 1, the rate to Paducah being unreasonable in and of itself.

Again the rate, as an entirety, was there attacked, in the making of which all carriers participated. In this case, the only carrier interested in the arbitrary is the Gulf Company, and no other carrier in anywise participates therein. Furthermore, that for which the excess charge is made is for transportation *to* the trunk line, not transportation *by* the trunk line after the tonnage reaches its rails. The charge for that which Swift would have to do for himself is not unreasonable, and the fundamental difference between the rate structure in the Paducah Case and the rate structure in this case is the difference between a joint trunk-line structure, and one in which the shipper employs a short line to overcome that which he must otherwise do himself, at his own expense.

The *Richmond Switching Case,* 254 U. S., 57, 62, does not contravene, because there the discrimination was the individual act of the delivering carrier performed precisely under similar circumstances and conditions. Outside of these two cases, no citations, with deference, are made which militate, even seemingly, against our contention.

In this cause, appellant would take from this carrier its power to manage its own affairs, to group its rates as it sees fit, and to shape its policy as it deems best; and the Commis-

sion seeks to compel this carrier to abdicate, and to allow its competitors to so arrange its affairs as that the rate structure in force since 1906, assented to by Swift, must be upturned by reason of what is done by others. If the principle here announced is carried out, then each short-line carrier would be controlled absolutely as to its rate structure by those things done by its competitors actuated in not a few instances, by a desire to absorb, and thereby, at the same time, destroy. As declared in the Creosoting Case:

> "If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford the carriers the assurance that they were not in some way violating the provisions of Section 3."

This carrier would rather cancel all joint rates and revert to its original condition than to allow its property to become subject to other than its own management in accordance with the law.

The theory is that of a revocable grant of a use only. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S., 345.

That which the Gulf Company granted the public was the right to use its line as a common carrier. This grant involved, as concomitant, the absolute right to exact of those using a reasonable return for its use, and the Commission has, in this cause, found that the return exacted of Swift was and is a reasonable return for the service rendered. So finding, the sole further power, under the Constitution, of the

Commission is to compel the carrier to transport for all upon the same terms. The right so to do, namely, to exact a reasonable compensation, found to be reasonable by the Commission in this very case, precludes the power of the Commission to compel service at a lower rate, because another carrier has so done under other conditions, under other circumstances.

We deny the right of the Commission to integrate into the Gulf Company's rate structure prices fixed by our competitors. Under the grant made, as phrased in the Wolf Case, irrevocable as therein declared under the Munn Case, the right was conferred upon the public to a use of the property for a reasonable return, but this right was not granted to our competitor. He was and always remained our enemy, and it was, under the law of competition, he desired that we be destroyed, so that he might make his business the more profitable; but when, as here, the grant is to the users and owners of this timber, it does not vest in a carrier, situated at a distance, the right to control that which appertained solely to our customers and ourselves. As phrased in the Wolf Case, we can give up the franchise if the operation is impossible without continuous loss, and under the financial exhibits made, there would be foreordained not only a continuous loss, but an absolute destruction of our property.

If all of this timber had belonged to one individual, and by reason of the necessities appertaining to a war (or other matters whereunder this individual had become subject as to the price or disposition to the public authority), and the removal had been requisite over this railroad, as it is now, and the Constitution still stood as admeasuring price, it would have been requisite, to have vouchsafed to this individual the

cost of the railroad in admeasuring the disposition price of the timber. The mere fact that the legal interrelations are now vested in divers corporations does not in any wise authorize the Commission to deprive corporations of the equal protection of the law; they are just as much entitled thereto as is the individual. *Railroad Company v. Ellis,* 165 U. S., 154; *Finance Corporation v. Exchange Corporation,* U. S. Supreme Court Adv. Op., 1923, page 757.

As was said in *Georgia Railway & Power Company v. Railroad Commission,* U. S. Supreme Court Adv. Op., 1923, page 729:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, that which the public is entitled to demand is that no more be exacted from it for the use of a public highway than the service rendered by it be reasonably worth."

Under this rule, the Commission has found that a fair return is made under this reasonable rate, and nowhere, in this or any previous case, do we find what the Commission has here used as an instrumentality for breaking down our reasonable return has been allowed. As said in *Bluefield, etc., v. Public Service Commission,* U. S. Supreme Court Adv. Op., 1923, page 718:

> "It seems to be generally held that in the absence of peculiar and extraordinary conditions * * * the actual amount of money invested is to be taken as the basis and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done upon capi-

> tal invested in similar enterprises. In addition to this, consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risk incident to a hazardous investment."

Now, if the hazard of the investment increases, the reasonable return, under the Constitution, of necessity, consumption of the property in the use renders requisite a rate that will make a capital return. As further declared in that case:

> "Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service, are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary."

And yet, in this very case, where 90 per cent and more of the tonnage is timber, the rate is to be reduced to such an extent as to mean, of necessity, the destruction of the service. Again, as declared in that opinion:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to receive the money necessary for the proper discharge of its public duty."

And we have yet to find a financier who, when he found the carrier was deriving its revenue from a self-limited operation, would predicate a loan to that carrier upon the

theory that he would receive his payment, when that carrier was receiving from the self-limited tonnage but an interest return, without the creation of a capital reserve requisite to assure the return of the money initially invested. In short, no sane banker would lend his money to a self-limited operation whose property was being daily consumed in the use, when he was therefor to receive nothing but an interest return, and must know his principal would be lost, because his debtor was rendering a service upon a theory of perpetual existence when perpetual existence is impossible under the given factors of the case.

Note, also, *Wilcox v. Consolidated Gas Company,* 212 U. S., 19, 48-50; *Cedar Rapids Gas Co. v. Cedar Rapids,* 223 U. S., 655, 670; *Des Moines Gas Co. v. Des Moines,* 238 U. S., 153, 172; *Lincoln Gas, etc., Co. v. Lincoln,* 250 U. S., 256, 268.

In the Bluefield case, the interest return was held to be approximately 8 per cent with proper depreciation allowance. Now, if the investor is entitled to 8 per cent, it means 8 per cent with a return of the principal, not 8 per cent without a return of the principal, which would be true in the case at bar if the theory which we have herein shown to be correct is not adopted, and for the Commission to seek to admeasure a reasonable rate upon our line what is a reasonable rate upon a railroad line that will run forever is to seek to apply a yardstick in the admeasurement of unlimited distance.

A typical railroad operation serving an established country cannot be made the criterion for admeasuring a rate where the operation is self-limited. The greatest blessing of any country is a wise citizenship, capable and competent to take care of its own rights, and the fact that substantially

all of the timber in the territory in Mississippi from Norfield south to the Gulf has been cut and moved under this rate structure demonstrates that these citizens have naught whereof to complain. If, perchance, the tonnage was on the trunk line, it commanded a higher value. If, by the effort of the owner, it must be hauled to the trunk line, the owner reflected in the price which is paid the place disadvantage, and now, having reflected in the price paid the place disadvantage and therefor profited, he seeks to profit doubly by eliminating that wherefor he has now already received compensation by compelling this company to do that which, if he did himself, he would have to pay the same amount which this company now asks the right to exact therefor. Demanding from the timber shipper but the cost which the shipper must needs expend in overcoming place disadvantage found by the Commission to be reasonable—with deference—more than reasonable, we deny the right of such a shipper to destroy our autonomy—to compel us to serve at less than a reasonable rate because another, dissimilarly situated, has seen fit thus to do.

Point V.

CONVERTIBLE VALUE OF MONEY DEPRIVES APPELLEES OF PROPERTY UNCONSTITUTIONALLY, IF RELIEF GRANTED.

By the bill, it is averred:

> "Complainants aver that for the services rendered in the transportation of lumber at the present rates, with the convertible value of money, that the rate upon lumber is lower, and to further reduce it by the elimination of the arbitrary would be to deprive complainants of their property without due process

> of law and compel them to render a service for said shippers at a lower figure than that which, under the Constitution, they are entitled to exact, in view of the provisions of the transportation act."

The convertible value of money expresses its worth to the possessor. The rates had accordingly been fundamentally reduced, and thereby to compel these carriers to transport at this rate was to afford the public a service at a price far less than that originally fixed as reasonable therefor.

Point VI.

No Authority in Commission to Eliminate Arbitraries on Short Lines by Enactment of a Universal Order at July 2, 1919.

No order of the Commission can be made without evidence upon which to base it, and if so made, it is without validity. *Akron, etc., v. United States,* U. S. Sup. Court Adv. Op., 1923, page 316 The Commission was passing upon one single condition, namely: Discrimination at Knoxo, Mississippi, yet notwithstanding the evidence was confined exclusively to Knoxo, and the rate structure there obtaining, the Commission saw fit under this petition, without evidence other than that properly appertaining in this record, to announce a general rule destroying all arbitraries. This was beyond its power. *Southern Pacific Co. v. Commission,* 219 U. S., 433.

The extension of the power by the Transportation Act, with deference, did not validate an order predicated upon a petition filed before its passage, and as to which no

retroactive effect could be given, nor validate a proceeding wherein all of the evidence was confined to a time preceding the date of the order. The condition of this carrier was such as to preclude this course, and where, as pointed out, there were 95 short lines in this territory, of whom 82 pursued this policy, and only 13 did that which the Commission thought proper (and divers of these for special reasons), then it does not lie within the power of the Commission, without a general investigation, and under general evidence, by a five to three opinion, to announce general principles controlling throughout the Nation, and upturn the settled practice for many years upon hundreds of lines of road.

The seriousness of this controversy was not fully appreciated, with deference, by the Commission. Its theory of rate uniformity was attractive, but the price to be paid therefor is such as to preclude its adoption. With full assurance, therefore, we confidently assert that this carrier was entitled to name its own rate, and since that rate had been named for a period of over six years, it was then, contractually, agreed to by the sole petitioner. This contract was kept for nearly ten years, and it was only by reason of outside suggestion that its solemn obligation was sought to be subverted.

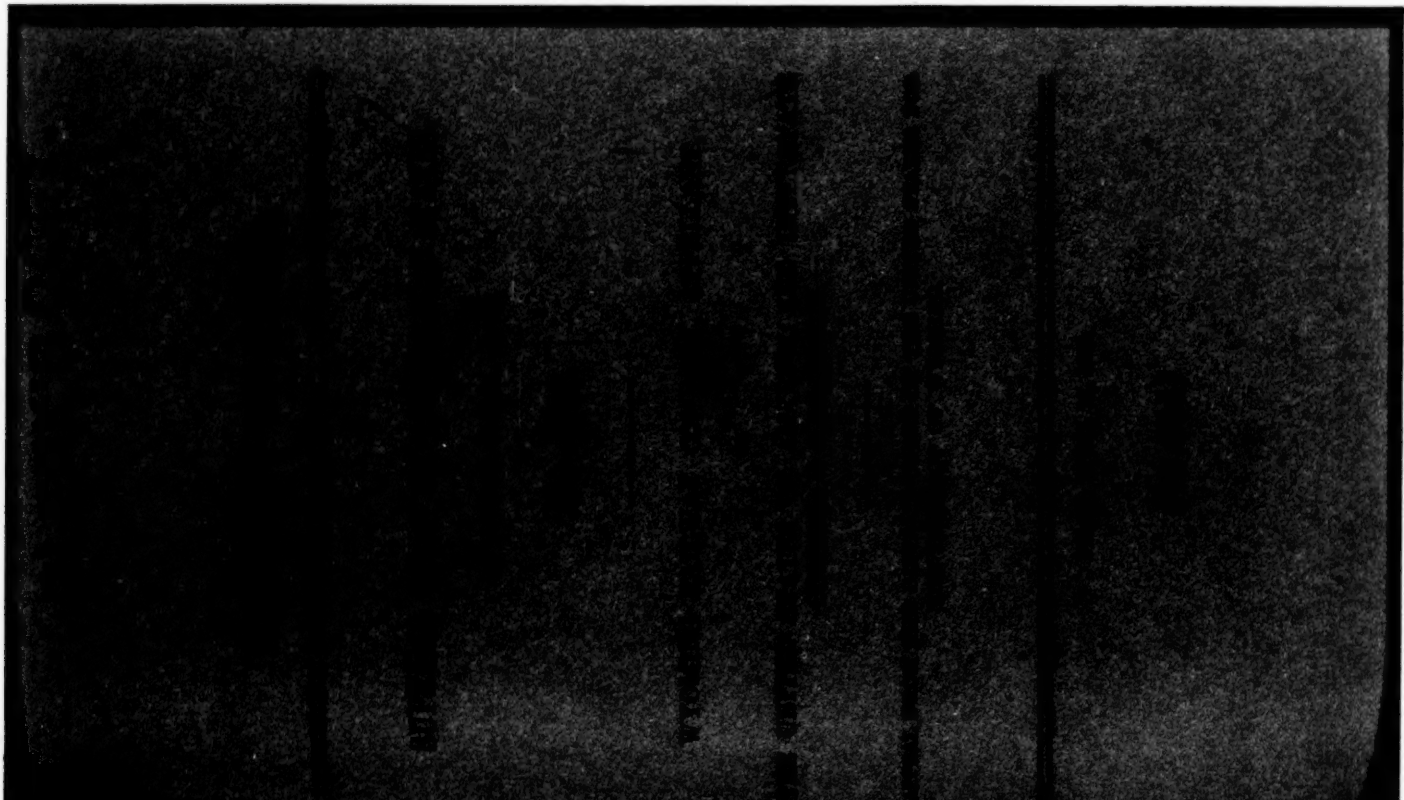
Upon the principles of common justice, we insist that the contract, as made, be carried out, and that Swift be compelled to pay the price which he agreed to pay.

Respectfully submitted,

MARCELLUS GREEN,
GARNER WYNN GREEN,
Solicitors for Fernwood, Columbia and Gulf Railroad Company.

9r

A copy of this brief was served by mail, postage prepaid, on the — day of ——, 1923, upon L. Palmer, Solicitor for Swift Lumber Company, 606 Commercial Place, New Orleans, La., and Hon. R. V. Fletcher, Solicitor for Illinois Central Railroad Company, Chicago, Ill., and by delivery to Hon. Blackburn Esterline, Special Assistant to the Attorney General, and Hon. J. Carter Fort, Solicitor of Interstate Commerce Commission.



(28,844)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 338.

WYOMING RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Exhibit A—Report of Interstate Commerce Commission in No. 11608	21	12
Notice of bill of complaint, &c	30	18
Order for hearing on restraining order	33	20
Motion to dismiss	35	21
Order allowing Interstate Commerce Commission to intervene	36	21
Appearances for Interstate Commerce Commission	37	22
Answer of Interstate Commerce Commission	38	22
Order denying restraining order, &c	41	24
Petition for appeal	43	26
Order allowing appeal	45	27
Assignment of errors	46	28
Bond on appeal	48	29
Citation and service	51	31
Oral opinion, Lewis, J	53	32
Judge's certificate	58	35
Præcipe for record	59	36
Proceedings before Interstate Commerce Commission	60	37
Complaint	61	38
Exhibits A to E, inclusive—Statements	66	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1922.

	Original.	Print.
Answer of Director General of Railroads	69	46
C., M. & St. P. Railway Co	71	47
Great Northern Ry. Co	74	49
Northern Pacific Ry. Co	76	50
C., B. & Q. R. R. Co	77	50
Wyoming Ry. Co	79	52
Deposition of George G. Belt	83	54
Index of witnesses	87	57
Colloquy	89	58
Testimony of R. S. Brown	92	60
P. M. Backus	143	87
L. I. Heilman	173	104
R. S. Brown (recalled)	184	110
C. N. Bolander	188	112
L. R. Capron	214	125
G. A. Hoffelder	219	128
J. S. Reid	228	132
George E. Belt	231	134
Exhibit Brown 1—Freight-rate authority No. 10	268	152
2—Statement of revenue per ton-mile since increases June 24, 1916	270	154
3—Blue-print map	271	154
4—Statement showing rates from representative points of origin, &c	272	154
5—Statement showing rates and ton-mile revenue, &c	273	154
6—Statement showing revenue per ton-mile accruing to carriers, &c	273½	154
7—Comparative statement of car-mile earnings	274	154
8—Local freight tariff issued August 18, 1920	274½	154
9—Local freight tariff, August 17, 1920	281	154
Exhibit Bolander 1—Statement of rates on forest products, &c.	282	155
2—Testimony of P. P. Hastings	283	157
3—Statement of rates on brick, carloads, effective June 25, 1918, &c	297	164
4—Summary analysis of traffic, year ending July 31, 1919	298	166
5—Summary report of freight commodity statistics	299	169
6—Supplementary report of freight commodity statistics	300	172
7—Trial balance, Wyoming Railway, December 31, 1920	301	175
8—Statement of operating revenues and expenses, December 31, 1913	302	176
Report proposed by F. W. McM. Woodrow, examiner	303	177
Stipulation extending time	313	182
Order extending time	314	183
Clerk's certificate	315	183

Pleas in the District Court of the United States for the District of Wyoming, Sitting at Cheyenne.

Be it remembered, that heretofore, towit on the sixteenth day f January, in the year of our Lord one thousand nine hundred nd twenty-two, came Wyoming Railway Company and filed in the id court its Bill of Complaint.

And said Bill of Complaint is in words and figures as follows, wit:

In the District Court of the United States, District of Wyoming.

No. 1235. Civil.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Bill of Complaint.

William T. Alden,
Attorney for Plaintiff.

Filed Jan. 16, 1922.
CHARLES J. OHNHAUS,
Clerk.

In the District Court of the United States, District of Wyoming.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Bill of Complaint.

Plaintiff, Wyoming Railway Company, a corporation, suing on own behalf and on behalf of other carriers affected by the order the Interstate Commerce Commission, hereinafter complained , who may desire to join herein and assume their proportional rt of the costs and expenses, present this bill of complaint against e United States, and for cause of action says:

I.

The plaintiff, Wyoming Railway Company, is a corporation duly ganized and existing under and by virtue of the laws of the

State of Wyoming; and is a common carrier engaged in the transportation of freight by railroad in interstate commerce.

4 II.

This is a suit to suspend and set aside an order of the Interstate Commerce Commission and is brought pursuant to the provisions of the Judicial Code of the United States, and of the Act of October 23, 1913, Chapter 32, 38 Statutes at Large, 220. The matter in controversy in this suit exclusive of interest and costs, exceeds the sum and value of three thousand dollars.

III.

The order which the plaintiff seeks to have suspended and set aside is an order made by the Interstate Commerce Commission on November 3, 1921, in its Docket No. 11608, entitled, Pioneer Lumber Company et al. v. Director General, as Agent, Chicago, Burlington & Quincy Railroad Company et al., reported in Volume 64 Interstate Commerce Commission Reports, beginning at page 485. A copy of said order and the report of the said Interstate Commerce Commission filed in connection therewith is marked Exhibit "A" and made a part of this petition.

IV.

The parties upon whose petition said order of the Interstate Commerce Commission was made are, Pioneer Lumber Company and Buffalo Lumber Company, both of which are corporations existing under and by virtue of the laws of the State of Wyoming, and are residents of said State of Wyoming, and both of which are engaged in the lumber and fuel business in Buffalo, Wyoming.

V.

Said Pioneer Lumber Company and Buffalo Lumber Company, hereinafter referred to as the petitioner Lumber Companies, on or about July 7, 1920, filed a complaint with the Interstate
5 Commerce Commission wherein they alleged that the rates charged by this plaintiff and other connecting carriers by railroad since June 25, 1918, on interstate carload shipments of lumber and lumber products, from points in Idaho, Montana and Washington, to Buffalo and Ucross, Wyoming, and on intrastate shipments of brick, in carloads, from Sheridan, Wyoming, to Buffalo were unreasonable, unjustly discriminatory and unduly prejudicial. Said lumber companies prayed in their said petition for reparation on past shipments and for the establishment of lower interstate rates on lumber for the future.

VI.

The said plaintiff herein and other carriers by railroad, who were the named defendants in the petition of said petitioner lumber companies to the Interstate Commerce Commission, duly filed their answers to the said petition and thereafter, and on September 16, 1920, the Interstate Commerce Commission held a hearing at Spokane, Washington, at which time the several parties to the proceeding before the Interstate Commerce Commission appeared before it and presented their evidence, both in support of and in denial of the allegations of said petition of said lumber companies.

VII.

Thereafter, and on November 3, 1921, Division 4 of the Interstate Commerce Commission, consisting of Commissioners Meyer, Daniels and Esch, made public its report in said proceeding before the Commission as reported in Volume 64, Interstate Commerce Commission Reports, beginning at page 485, and issued its order based on said report, which said order is the order which it is sought to suspend and set aside in this proceeding.

6

VIII.

In its said report and order, the Interstate Commerce Commission found that no evidence was offered in support of the allegation of unjust discrimination, and further found that the interstate rates assailed on lumber and lumber products were not, and are not unreasonable; that during the period of federal control the intrastate rates on brick in issue were not unreasonable or otherwise unlawful; but that the failure of the defendants to extend the blanket rates on lumber applicable to points on the Chicago, Burlington & Quincy Railroad Company to the other points of Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on the main and branch lines of the Chicago, Burlington & Quincy Railroad Company, or on independent connecting lines, other than the Wyoming Railway Company, but without specifying what other independent connecting lines are thus sought to be described, is, and for the future will be, unduly prejudicial. By said order the Interstate Commerce Commission required the defendants in the proceedings before it, among which were the Wyoming Railway Company, plaintiff herein, on or before February 24, 1921, upon notice to the Commission and to the general public by not less than thirty days filing and posting, to establish and thereafter to maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana and Washington, to Buffalo and Ucross, Wyoming, rates which do not exceed the rates contemporaneously maintained from the same points to

Clearmont and Sheridan, Wyoming, and other points in the blanket territory on the line of the Chicago, Burlington & Quincy Railroad Company and independent connecting lines other than the Wyoming Railway Company, but without specifying what other independent connecting lines are thus sought to be described.

7

IX.

Plaintiff shows that the plaintiff, Wyoming Railway Company, is a short line of railroad independently owned and operated, which extends a distance of 28.6 miles from Clearmont, Wyoming, its junction with the line of railroad of the Chicago, Burlington & Quincy Railroad Company, to Buffalo, Wyoming, and that Ucross, Wyoming, is a local station on the line of said Wyoming Railway Company located a distance of approximately ten miles southwest of Clearmont, Wyoming. Plaintiff further shows that said towns of Buffalo and Ucross are not served by any other railroad company except the Wyoming Railway Company.

X.

Plaintiff further shows that the manner of making freight rates on lumber from points in the State of Idaho and other states to the local stations of Buffalo and Ucross on the Wyoming Railway Company, is to apply the rate applicable from point of origin to Clearmont, Wyoming, which is the junction point between the Chicago, Burlington & Quincy Railroad Company and the Wyoming Railway Company, and to add thereto the lawfully published rates of the Wyoming Railway Company from said junction point of Clearmont to Buffalo, or Ucross, Wyoming, as the case may be.

XI.

Plaintiff further shows that the Wyoming Railway Company was incorporated in the State of Wyoming on May 26, 1909, but that its line of railroad was not completed until 1918. Plaintiff further states that the operation of said Wyoming Railway Company has not been profitable, but that at all times during its operation, and at present, it has been and is being operated at a loss. Plaintiff

8 shows that during the year 1918, said Wyoming Railway Company incurred an operating deficit of $46,408.72 and an operating deficit of $24,917.80 in 1919; that no interest has been paid on its bonds for nearly three years; that no dividends have ever been paid on its stock; and that its officers or directors have received no salaries. Plaintiff further states that the line of the Wyoming Railway Company extending from Clearmont to Buffalo is operated through a sparsely settled country with no present prospect of increased traffic and that in operating from Clearmont to Buffalo for the distance of 28.6 miles, it is necessary to haul traffic over severe and heavy grades for the reason that the town of Buffalo is nearly one thousand feet higher than the town of Clearmont.

XII.

Plaintiff shows that the Interstate Commerce Commission in its said report admitted the existence of all of the facts herein alleged, and found that said facts point to the conclusion that neither the combination rates on lumber nor the component thereof were, or are, unreasonable per se, and that said Interstate Commerce Commission specifically found that no evidence had been offered in support of the allegation of unjust discrimination. But plaintiff alleges that the Interstate Commerce Commission, after making said findings, then undertook to make and did make and issue an order wherein and whereby the said rates on lumber from points of origin in the States of Idaho, Montana and Washington, to Clearmont, Wyoming, the junction between the Chicago, Burlington & Quincy Railroad Company and the Wyoming Railway Company, should be extended with no additional compensation whatever to either carrier to the local points of Ucross and Buffalo, Wyoming, on the line of the Wyoming Railway Company under the guise of ordering the removal of undue prejudice against said Pioneer Lumber Company and Buffalo Lumber Company which the Interstate Commerce Commission
9 pretended to find to exist. Said plaintiff alleges that in making said finding and order, the Interstate Commerce Commission exceeded its powers and acted in an arbitrary and void manner.

XIII.

Plaintiff shows that the grounds on which the Interstate Commerce Commission undertook to enter said findings and order, were that the Chicago, Burlington & Quincy Railroad Company, publishes the same blanket rate which is applicable at Clearmont, Wyoming, on lumber in carloads, to destinations located over a considerable stretch of its main line, and also extends that rate to points located on its branch lines. Plaintiff alleges that said finding of the Interstate Commerce Commission was made upon the theory that under these circumstances a shipper situated on an independent branch line connected with this blanketed stretch of main line of another carrier, is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the main line's owned branches.

XIV.

Plaintiff further shows that said order of the Interstate Commerce Commission is arbitrary and void for the reason that it is specifically stated by the Interstate Commerce Commission that it is entered upon the theory that Buffalo and Ucross are entitled to the blanket rates applicable to Clearmont, Wyoming, a junction point between the Chicago, Burlington & Quincy Railroad Company and the Wyoming Railway Company, in spite of the fact that the Interstate Commerce Commission specifically found that neither the combina-

tion rates applicable to Buffalo and Ucross, nor any of the components thereof, were, or are, unjust or unreasonable, or unjustly discriminatory.

10

XV.

Plaintiff further states that the Wyoming Railway Company does not participate in the transportation of lumber and other timber products from points in the States of Idaho, Montana and Washington to Clearmont, Wyoming, or any other point on the line of the Chicago, Burlington & Quincy Railroad Company within the territory wherein that company maintains the blanket rate to which the Interstate Commerce Commission refers, and that the Wyoming Railway Company has no power or authority to dictate in any way what the rate shall be from said producing points in Idaho and other states to points on the line of said Chicago, Burlington & Quincy Railroad Company.

XVI.

Plaintiff, Wyoming Railway Company, shows that under the guise of removing a pretended undue prejudice against the Pioneer Lumber Company and the Buffalo Lumber Company, for which this plaintiff is in nowise responsible, the Interstate Commerce Commission has undertaken to deprive it of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. Particularly, this plaintiff shows that it is found by said Interstate Commerce Commission that its present operations are being conducted at a financial deficit, and that the rates on lumber which it now charges are not unreasonable, or unjustly discriminatory, and that if it is required to become a party to a reduction in rates which are not now unreasonably high, and which will not now enable said plaintiff to earn a fair rate of return upon its property, it will be presently deprived of its property without due process of law, and without just compensation. That no agreement has been made, or can be made, with the Chicago, Burlington &
11 Quincy Railroad Company and other trunk lines for a division of the joint rates on lumber and lumber products to points on the line of railroad of this plaintiff which will yield to this plaintiff a sum sufficient to pay for the cost of the service, or even a rate that will equal the present local rate of this plaintiff on lumber and lumber products. That as yet the Interstate Commerce Commission has not fixed any definite rule of divisions between trunk lines and independently owned short line railroads under the Transportation Act of 1920; that such question is now pending before the Interstate Commerce Commission in two or more cases. That the statement of the Interstate Commerce Commission in its report, wherein it pretended to avoid the unlawfulness of their finding, that is, the statement that "the question of divisions, and whether or not the Wyoming should receive its full local or only a part thereof out of the blanket rate, is not here in issue," will in nowise serve to avoid

for the plaintiff the deprivation and taking of its property without due process of law and without just compensation.

XVII.

Plaintiff further shows that the defendant common carriers in the said proceeding before the Interstate Commerce Commission other than the Wyoming Railway Company are without power under the law to extend present blanket rates on lumber now applicable to Clearmont, Wyoming, and other points on their lines, to the local stations of Ucross and Buffalo, Wyoming, on the line of the Wyoming Railway Company, unless the Wyoming Railway Company consents thereto. Plaintiff shows that the Wyoming Railway Company declines and refuses to permit other said carriers to extend such blanket rates to points on its line, but instead insists that the service which it performs justifies higher rates to points on its
12 lines than to points on the lines of other carriers. Plaintiff further states that the effort of the Interstate Commerce Commission to compel and require the Wyoming Railway Company to permit carriers other than itself to establish said blanket rates to points on its line, is arbitrary and void.

XVIII.

Plaintiff further avers that said order is not based upon any substantial evidence which will support or justify it, since all of the evidence offered shows that the rate in question is not unreasonable and does not discriminate against either persons or localities, and that there is no competition between retail lumber dealers, including petitioner lumber companies, situated considerable distances apart in the territory involved. The finding of the Commission purports to be based solely upon a new and unlawful conception of undue prejudice as defined by the Interstate Commerce Act, and is designed to accomplish by indirection the reduction of rates which are specifically found to be neither unreasonable nor unjustly discriminatory.

XIX.

Plaintiff further states that the Wyoming Railway Company can not be jointly or severally held responsible for any undue prejudice in connection with the rates on lumber from producing points in Idaho, Montana and Washington, to points on the lines of other railway companies where it does not participate in the transportation, nor join in the publication of the said rates, and that any order made in respect to the Wyoming Railway Company in these circumstances is unsupported by any substantial evidence and is contrary to the law, exceeds the power of the Interstate Commerce Commission and is arbitrary and void, as to the Wyoming Railway Com-
13 pany, and as the carriers other than the Wyoming Railway Company cannot comply with the order of the Commission

entered without the consent of the Wyoming Railway Company, the order is likewise arbitrary and void as to them.

XX.

Plaintiff further shows that the order of the Interstate Commerce Commission is arbitrary and void in that it seeks to merge the lines of all railroads operating in a particular district, without regard to their independent ownership and the independent character of their operation, and against the desire and consent of the owners of said railway companies, in plain contravention of the Fifth Amendment of the Constitution of the United States.

XXI.

Plaintiff further avers that said order is contrary to the law and in violation of the powers conferred upon the Commission in this, that the rate so assailed is not unduly prejudicial within the purview of said Act under the record made before the Commission. Said record shows absolutely no undue prejudice within the condemnation of the statute and said order as to undue prejudice under the record upon which it purports to have been made, is in excess of the constitutional power of the Commission, and is for that reason void.

XXII.

Plaintiff further avers that said Commission erred in its interpretation of the law in holding that because a trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a stretch of its main line, and also extends that rate to points on its branch line, shippers located on another and independently owned and operated short line of railroad, such as the Wyoming Railway Company, connecting with this blanketed
14 stretch of main line, are automatically entitled to the blanket rate.

XXIII.

Plaintiff further shows that said order of the Interstate Commerce Commission is arbitrary and void because it is so vague and indefinite in its scope and operation as to be wholly meaningless and unintelligible in that it fails to describe with any precision whatever the blanket territory to which it refers or the independently operated connections of carriers other than the Wyoming Railway Company which are said to have rates in effect that must be contemporaneously applied to local stations on the line of the Wyoming Railway Company.

XXIV.

Plaintiff avers that irreparable damage will accrue from the enforcement by the Commission of the said order for the reason that

this plaintiff will be required and compelled to transport lumber in carloads in interstate commerce at the rates which the Interstate Commerce Commission had undertaken to require to be established upon thirty days' notice effective on and after February 24, 1922, which said rates are lower than the present rates, and that this plaintiff will be without remedy to collect from shippers and consignees of said lumber the difference between said rates and the present rates in the event that it shall finally be determined that said order of the Interstate Commerce Commission is null and void and unenforceable unless and except said order be forthwith enjoined, restrained and suspended by this Honorable Court.

15 XXV.

Said order in said Docket No. 11608 is in excess of the power conferred upon said Interstate Commerce Commission by the Interstate Commerce Act:

(*a*) Said order declares that the plaintiff, Wyoming Railway Company, has subjected the petitioner lumber companies to undue prejudice by reason of rates on lumber maintained by other railroad companies in which rates said Wyoming Railway Company does not join or participate.

(*b*) Said order determines the measure of rates on lumber to points on the line of the Wyoming Railway Company by the rates in effect to points on the lines of other railway companies in which latter rates the Wyoming Railway Company does not join or participate.

(*c*) Said order requires rates on lumber from producing points in the States of Idaho, Montana and Washington, to points on the line of the Chicago, Burlington & Quincy Railroad Company to be extended to points on the line of the Wyoming Railway Company with no additional compensation for the increased service involved in the transportation of said lumber from the junction point between said Chicago, Burlington & Quincy Railroad Company and said Wyoming Railway Company to local points on said Wyoming Railway Company.

XXVI.

Said Interstate Commerce Commission in its proceeding in said Docket No. 11608 has applied erroneously rules of law:

(*a*) In said report in said Docket No. 11608, which said report is made a part of said order in said proceeding, by direct reference thereto, the Interstate Commerce Commission specifically found that
16 no evidence was offered by said petitioner lumber companies in support of their allegation of unjust discrimination, and that neither the rates on lumber from producing points in Idaho and other states to points on the Wyoming Railway Company, nor the components thereof, were or are unreasonable, yet said In-

terstate Commerce Commission without any valid findings to support it, and in direct contradiction of said findings so made, has undertaken to enter, and has entered and issued, an order wherein this plaintiff and other carriers are required to establish and maintain the same rate on lumber to points on the Wyoming Railway Company from producing points in the States of Idaho, Montana and Washington as the Chicago, Burlington & Quincy Railroad Company and its connections other than the Wyoming Railway Company may, or shall, contemporaneously maintain to Clearmont, Wyoming, the junction point at which said Chicago, Burlington & Quincy Railroad Company delivers said lumber to the Wyoming Railway Company when destined to points on the line of said latter company.

(*b*) Said Interstate Commerce Commission in direct contravention of law and in an erroneous application of the provisions of the Interstate Commerce Act, made the following finding in its said report in said Docket No. 11608:

"Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to points located on its branch lines a shipper situated on an independent branch line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than to Buffalo. Buffalo and Ucross are entitled to the blanket rates."

17 And based upon said erroneous interpretation of law as incorporated in its order by direct reference thereto, said Interstate Commerce Commission has ordered the plaintiff, Wyoming Railway Company, to join in the establishment of the same rate on lumber to local points on its line of railroad as common carriers other than the Wyoming Railway Company shall contemporaneously maintain to the junction point between the Wyoming Railway Company and the Chicago, Burlington & Quincy Railroad Company.

(*c*) Said Interstate Commerce Commission in its order in said Docket No. 11608 has required that plaintiff, Wyoming Railway Company, shall transport lumber from Clearmont, Wyoming, its junction with the Chicago, Burlington & Quincy Railroad Company to local stations on its line, with no additional charge to the shipper or consignee of said lumber over and above the rate from point of origin in Idaho, Montana and Washington to said Clearmont, Wyoming, in spite of the fact that additional and expensive service is involved in transporting said lumber from Clearmont to local points

on the Wyoming Railway Company, and that under present rates said Wyoming Railway Company is not earning any return whatever on its property devoted to said transportation.

XXVII.

Said order in said Docket No. 11608 is arbitrary and void, because issued without any lawful findings to support it and because there was no substantial evidence before said Interstate Commerce Commission to sustain said order.

(*a*) Said report and order show that they were issued by the said Commission solely in furtherance of an illegal method of rate making, to wit, that short lines of railroad independently operated, must join in the establishment of through rates to local stations on their lines of railroad which shall be the same as rates contemporaneously applicable from points on other lines of railroad to its junc-
18 tion point with such of the other said lines of railroad.

(*b*) Said report and order show on their face that they were issued without any substantial evidence before the Commission to support allegations of unreasonableness or unjust discrimination existing by reason of the rates of any of the plaintiffs.

(*c*) Said report and order show on their face that they were issued without any evidence whatever of any violation of any section of the Interstate Commerce Act by reason of the rates of the plaintiff, Wyoming Railway Company.

(*d*) Said report and order show on their face that they are in direct contravention of the Fifth Amendment to the Constitution of the United States and that said order is arbitrary and void in that it requires the Wyoming Railway Company and other carriers, to furnish a new and additional service of transportation over and above that which they have voluntarily undertaken to furnish, with no additional compensation therefor.

(*e*) Said report and order show on their face that they are arbitrary and void in that they were issued in furtherance of a mistaken theory of the law formerly entertained by the Interstate Commerce Commission, which has been recently condemned, overruled and set aside by the Supreme Court of the United States in a proceeding before it entitled, Central Railroad of New Jersey v. United States, October Term, 1921, No. 436, decided December 5, 1921, 42 Supr. Ct. Repr. 80.

Wherefore, as this plaintiff is without adequate remedy under the law for its protection in said matter, plaintiff files this, its bill, and prays that the usual process may issue out of the office of the clerk of this court to the defendant, the United States, and that notice be given to the Interstate Commerce Commission, as required
19 by law, that the defendant be required to answer this bill, and that upon a hearing thereof the said order of the Inter-

state Commerce Commission made in pursuance of the report of the Commission, dated November 3, 1921, be annulled, suspended, set aside and held for naught; that a restraining order be issued herein restraining the defendants from making said order effective in any way, or to any extent whatsoever, and that an interlocutory injunction, which shall upon final hearing be made perpetual, be entered annulling, suspending and setting aside said order of November 3, 1921, and enjoining the enforcement thereof; and that plaintiff be given such other and further and different relief as to your Honors may seem meet, and the plaintiff will ever pray.

W. F. ALDEN,
Attorney for Plaintiff.

#1110, 134 So. La Salle St., Chicago, Ill.

20 STATE OF ILLINOIS,
County of Cook, ss:

W. T. Alden, being first duly sworn, on oath says that he is Secretary and General Counsel of the Wyoming Railway Company, plaintiff herein, and that he is authorized to make this affidavit on behalf of said plaintiff, that he has read the above and foregoing bill of complaint, knows the contents thereof and that the same is true in substance and in fact.

W. T. ALDEN.

Subscribed and sworn to before me this fourteenth day of January, 1922.

[Seal of Hertha Ebert, Notary Public, Cook County, Ill.]

HERTHA EBERT,
Notary Public, Cook County, Illinois.

My commission expires June 8, 1924.

21 EXHIBIT A.

Interstate Commerce Commission.

No. 11608.

PIONEER LUMBER COMPANY et al.

v.

DIRECTOR GENERAL, as Agent Chicago, Burlington & Quincy Railroad Company, et al.

Submitted July 16, 1921. Decided November 3, 1921.

1. Rates on lumber and lumber products, in carloads, from points in Idaho, Montana and Washington to Ucross and Buffalo, Wyo., found not unreasonable, but unduly prejudicial. Nonprejudicial rates prescribed. Reparation denied.

2. Rates on brick, in carloads, from Sheridan, Wyo., to Buffalo, during federal control, found not unreasonable or otherwise unlawful.

J. B. Campbell, Frank Lyon and R. S. Brown, for complainants.
F. G. Dorety and R. J. Hagman for all defendants except Wyoming Railway; Burt Griggs and Alden, Latham & Young for Wyoming Railway.

Report of the Commission.

Division 4, Commissioners Meyer, Daniels and Esch.

By DIVISION 4:

Exceptions were filed by complainants and defendants to the report proposed by the examiner, and the case was orally argued before us.

22 Complainants, the Pioneer Lumber Company and the Buffalo Lumber Company are corporations engaged in the lumber and fuel business at Buffalo, Wyo. By complaint filed July 7, 1920, they allege that the rates charged since June 25, 1918, on interstate carload shipments of lumber and lumber products from points in Idaho, Montana and Washington, to Buffalo and Ucross, Wyo., and on intrastate shipments of brick, in carloads, from Sheridan, Wyo., to Buffalo were unreasonable, unjustly discriminatory and unduly prejudicial. The prayer is for reparation and the establishment of interstate rates on lumber for the future. No evidence was offered in support of the allegation of unjust discrimination. Rates will be stated in amounts per 100 pounds.

Buffalo, with a population of 1,800, is the terminus of the Wyoming Railway, 28.6 miles southwest of Clearmont, Wyo., the junction with the Chicago, Burlington & Quincy, hereinafter called the Burlington. Ucross, with a population of about 100, is also on the Wyoming 10 miles southwest of Clearmont. Wyoming was organized in 1910, but construction was not completed until 1918.

The shipments moved over defendants' lines and apparently the applicable rates were collected upon the Clearmont combination. On shipments moving during federal control complainants seek reparation to the basis of the rates which would have been applicable if the increase provided in general order No. 28 of the Director General of Railroads had been applied to the total combinations instead of to the separate components. On subsequent shipments the reparation claimed is based upon the rates contemporaneously in effect to Clearmont.

The rates on lumber and lumber products in the northwest have, for many years, been blanketed both as to points of origin and destination. In the so-called Northwest Lumber Cases, 14 I.

23 C. C. 1, 23, 41, 51, decided June 2, 1908, we prescribed reasonable rates to Clearmont which is embraced in the so-called blanket territory. The components to Clearmont on lumber and

lumber products here in issue are the rates thus prescribed increased under the general increases of 1918 and 1920.

General order No. 28 provided that rates on lumber and lumber products should be increased 25 per cent, maximum 5 cents, and that rates on brick should receive a flat increase of 2 cents. By applying these increases to each factor instead of to the through combinations an additional charge of 4 cents to Buffalo and 2 cents to Ucross on lumber and lumber products and 2 cents on brick to Buffalo resulted. Complainants contend that the Director General never intended that the increases should be applied to each factor, and that this is shown by his freight rate authority No. 10 of July 2, 1918, which directed, among other things, that the tariffs be revised so that the increases in general order No. 28 would be applicable to the total rates. The Wyoming increased its rates under general order No. 28 and the record shows that on June 29, 1918, it was released from federal control. Its rates were not changed in accordance with freight rate authority No. 10. With respect to the rates on brick complainants rely solely upon the fact that each factor of the combination was increased under general order No. 28. The reasonableness of these rates cannot be determined solely from the method of their construction. Defendants show that the assailed rates on brick compare favorably with other similar rates in this general territory.

On June 25, 1918, the rate on lumber from the coast group to Clearmont was 45 cents and from the Spokane group 38 cents. From Clearmont to Buffalo the rate was 20 cents, making combination rates of 65 and 58 cents, respectively. The present coast-group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors up to Clearmont are 56.5 and 47.5 cents, respectively. Com-
24 plainants submitted exhibits which showed the ton-mile and car-mile earnings on shipments of lumber. These earnings were compared with earnings that would have accrued if the shipments had moved to other destinations in the blanket territory which took the same rates as Clearmont. For example, a shipment of fir lumber from National, Wash., to Buffalo, 1,270 miles, earned 10.2 mills per ton-mile and under the present rates it would earn 12.8 mills. If this shipment had moved to Spearfish, S. Dak., 1,556 miles, it would have produced 5.7 mills per ton-mile and would now produce 7.2 mills. The rates to Birds, Colo., 1,676 miles, on this shipment would have yielded 5.3 mills and 6.7 mills, respectively. The factor up to Clearmont on this shipment yielded 7.2 mills and the factor from Clearmont to Buffalo, 14.03 cents per ton-mile. The present 81.5-cent rate from Everett, Wash., to Buffalo, 1,128 miles, based on a load of 63,760 pounds, the average load of fir lumber as given in Increased Rates, 1920, 58 I. C. C. 220, by the West Coast Lumbermen's Association, yields car-mile earnings of 46.06 cents, while the present Everett-Clearmont rate of 56.5 cents produces car-mile earnings of 32.77 cents. If the Clearmont rate were extended to Buffalo, the car-mile earnings would be 31.93 cents. The rate from Everett to Birds yields car-mile revenue of 21.45 cents.

Defendants maintain that these comparisions are of little value

because blanket rates are compared with blanket rates and the specific earnings vary with the distances used. They contend that the average point of origin and the average point of destination in the respective blankets should be considered, and that as the factors up to Clearmont were prescribed by us in 1908, and subsequently increased under general order No. 28 and the general increase of 1920, they are in and of themselves reasonable.

It appears that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919; no interest has been paid on its bonds for nearly three years; no dividends have ever
25 been paid on its stock; its officers and directors have received no salaries. Its line is only 28.6 miles in length and Buffalo is nearly 1,000 feet higher than Clearmont. The road is operated through a sparsely settled country with no present prospect of increased traffic.

The above facts point to the conclusion that neither the combination rates nor the components thereof were or are unreasonable per se. The question remains as to whether the rates resulted in undue prejudice.

The Pioneer Lumber Company has lumber yards at Sheridan, 38 miles north of Buffalo by dirt road, and at Ucross as well as at Buffalo, while the Buffalo Lumber Company has yards at Buffalo and at Kaycee, Wyo., about 60 miles south of Buffalo. The testimony shows that farmers within 8 miles north of Buffalo generally buy their lumber in Buffalo, but those farther north buy at Sheridan. There is a divide known as Tunnel Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyo., is on the Burlington just west of Clearmont. Competitors of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyo., is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad, and is approximately halfway across country, between Buffalo and Casper. This complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about 10 miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

26 Spearfish and Deadwood, S. Dak., are located on the branch line of the Burlington that connects with the main line at Edgemont, S. Dak. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colo., about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants content that the fact

that the defendants voluntarily apply the blanket rates to these points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming result in undue prejudice.

Defendants state that they extend blanket rates to points on independent short lines only when compelled to do so by competition. The Burlington extends the blanket rate from a point about 70 miles south of Billings, Mont., for a distance of about 600 miles through Alliance, Nebr., to Denver, Colo. This blanket was originally established to meet competition on lumber from California via the Harriman lines. At that time the Big Horn division of the Burlington had not been completed and to compete with the Union Pacific at Denver, the Burlington had to haul lumber received from the Great Northern and the Northern Pacific via its Sheridan route through Alliance. If the former rate had not been blanketed, fourth section violations would have been created along the Sheridan line. This would not account for the Burlington's extending the blanket to Spearfish, an additional haul from Edgemont of 130 miles. Competitive reasons compelled the extension of the blanket rates to Birds. The Great Western has two connections with the Union Pacific, one at Eaton, Colo., and one at Kelim, Colo.; two connections with the Colorado & Southern, one at Loveland, Colo., and one at Windsor, Colo., besides the connection with the Burlington at Longmont, Colo. Defendants contend that this competition distinguishes the situations at Birds and at Buffalo. But there is no such car-
27 rier competition at local main-line and branch-line stations on the Burlington in this blanket territory.

Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to points located on its branch lines a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of section 3 of the interstate commerce act against undue prejudice applies to localities as well as to shippers at those localities. As was said in Intermediate Rate Asso. v. Director General, 61 I. C. C. 226, at page 233, respecting competition between localities:

Thriving communities, all in the same general section of the country, striving for population, industry and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related.

We find that the interstate rates assailed on lumber and
28 lumber products were not and are not unreasonable; that during the period of federal control the intrastate rates on brick here in issue were not unreasonable, or otherwise unlawful; but that the failure of defendants to extend the blanket rates on lumber to Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for the future will be unduly prejudicial. Complainants have not shown that they were damaged by any undue prejudice which may have existed in the past. Reparation is therefore denied.

An appropriate order will be entered.

Order.

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office in Washington, D. C., on the 3d Day of November, A. D. 1921.

No. 11608.

PIONEER LUMBER COMPANY and BUFFALO LUMBER COMPANY.

v.

JAMES C. DAVIS, Director General of Railroads, as Agent; CHICAGO, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; The Great Northern Railway Company; Northern Pacific Railway Company; Oregon Trunk Railway Company; Spokane, Portland & Seattle Railway Company, and Wyoming Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed
29 a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 24, 1922, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of lumber and lumber products, in carloads, from points in Idaho, Montana, and Washington to Buffalo and

Ucross, Wyo., rates which exceed the rates made on the basis prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 24, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which do not exceed the rates contemporaneously maintained by them on lumber and lumber products from the same points to Clearmont and Sheridan, Wyo., and other points in the blanket territory on defendants' lines and independent connecting lines.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 4.

[SEAL.] GEORGE B. McGINTY,
Secretary.

30 In the District Court of the United States, District of Wyoming.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Notice.

To Hon. Harry M. Daugherty, Attorney General of United States, Department of Justice, Washington, D. C.: Interstate Commerce Commission, Interstate Commerce Building, Washington, D. C.: Pioneer Lumber, Company, Buffalo, Wyoming: Buffalo Lumber Company, Buffalo, Wyoming:

You and each of you are hereby notified that on Monday, the 16th day of January, 1922, the bill of complaint of the Wyoming Railway Company in the above cause will be filed with the Clerk of said Court, at Cheyenne, Wyoming, and that process will issue as required by law, a copy of which said bill of complaint is herewith served upon you.

You are further notified that on Saturday, the 21st day of January, 1922, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, we shall appear before the Honorable T. Blake Kennedy, United States District Judge in and for the District of Wyoming, in the court room of said Court in the City of Cheyenne, Wyoming, and before two other Federal Judges of the United States Court called by the said Judge Kennedy in accordance with the statutes in such case provided, and move the Court to issue a temporary injunction

as prayed for in said bill of complaint, and in support of said motion we shall read the bill of complaint and submit the record,
31 transcript of evidence and exhibits and other proceedings in the case of the Pioneer Lumber Company against the Director General of Railroads, lately pending before the Interstate Commerce Commission, as Docket No. 11608; at which time and place you may appear in opposition to said motion if you so desire.

Dated, January 14, 1922.

WILLIAM T. ALDEN,
Attorney for Complainant.

1110, 134 South La Salle Street,
Chicago, Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

Estelle Lowe, being duly sworn, deposes and says that she mailed a copy of the foregoing notice and copy of the Bill of Complaint therein mentioned, at Chicago, Illinois, on Saturday, the 14th day of January, 1922, to the following:

Hon. Harry M. Daugherty, Attorney General of United States, Department of Justice, Washington, D. C.

Interstate Commerce Commission, Interstate Commerce Building, Washington, D. C.

Pioneer Lumber Company, Buffalo, Wyoming.

Buffalo Lumber Company, Buffalo, Wyoming.

That such notice and bill of complaint was enclosed in an envelope properly addressed to the parties above named, sealed and deposited in the United States mail. Further affiant saith not.

ESTELLE LOWE.

Subscribed and sworn to before me this 14th day of January, A. D. 1922.

[SEAL.]

HERTHA EBERT,
Notary Public.

32 Endorsements: No. 1235 Civil. District Court of United States. District of Wyoming. Wyoming Railway Company vs. United States. Notice. Filed Jan. 16, 1922, Charles J. Ohnhaus, Clerk. William T. Alden, Atty. 1110, 134 South La Salle Street, Chicago, Ill.

33 In the District Court of the United States, District of Wyoming.

WYOMING RAILWAY COMPANY, Compainant,

vs.

UNITED STATES, Defendant.

Order.

This day came the above named complainant by its attorney, A. C. Campbell; also came A. D. Walton, United States Attorney for the District of Wyoming; whereupon, it was moved by complainant's attorney that the Restraining Order as prayed for in the Complaint be heard on the 21st day of January A. D. 1922.

And it appearing to the court that a copy of the written notice of said motion, was, on Saturday January 14th, A. D. 1922, mailed from the City of Chicago, State of Illinois to the Honorable Harry M. Daugherty, Attorney General of the United States; The Interstate Commerce Commission; the Pioneer Lumber Company, and the Buffalo Lumber Company, at their respective offices, and no objection having been made to the granting of said motion by the United States Attorney for the District of Wyoming;

It is ordered, that the application for a Temporary Restraining Order as prayed for in the Bill of Complaint be set for hearing in the courtroom of the United States District Court for the District of Wyoming at 10.00 o'clock in the forenoon of Saturday, January 21st, A. D. 1922.

Done in open court this 16th day of January A. D. 1922.

T. BLAKE KENNEDY,
Judge.

34 Endorsements: 1235 Civil. District Court of United States District of Wyoming. Wyoming Railway Company vs. United States. Order. Filed Jan. 16, 1922. Charles J. Ohnhaus, Clerk. William T. Alden, Atty., 1110, 134 South La Salle Street, Chicago, Ill. A. C. Campbell, Cheyenne, Wyoming.

35 In the District Court of the United States for the District of Wyoming.

No. 1235. Civil.

WYOMING RAILWAY COMPANY, Compainant,

vs.

UNITED STATES, Defendant.

Motion to Dismiss Bill of Complaint.

Comes now A. D. Walton, United States Attorney, for the District of Wyoming, and on behalf of the United States, the defendant above named, moves to dismiss the bill of Complaint of the complainant herein, for the following reasons and upon the following grounds, to wit:

1st. For want of equity.

2nd. That said bill of complaint does not state facts sufficient to constitute a cause of action in equity.

A. D. WALTON,
United States Attorney for the District of Wyoming.

Endorsements: No. 1235 Civil. In the District Court of the United States for the District of Wyoming. Wyoming Railway Company, Complainant, vs. United States, Defendant. Motion to dismiss Bill of Complaint. Filed Jan. 21, 1922. Charles J. Ohnhaus, Clerk. A. D. Walton, United States Attorney for the District of Wyoming. Clyde M. Watts, Asst. United States Attorney for the District of Wyoming.

36 In the District Court of the United States for the District of Wyoming, Saturday, January 21, 1922.

No. 1235. Civil.

WYOMING RAILWAY COMPANY, Plaintiff,

vs.

UNITED STATES, Defendant.

Order Allowing Interstate Commerce Commission to Intervene.

On motion, it is ordered that the Interstate Commerce Commission be permitted to intervene as a defendant in this cause, and to file its answer to the complaint herein.

37 In the District Court of the United States, District of Wyoming.

In Equity.

No. —.

WYOMING RAILWAY COMPANY, Compainant,

vs.

UNITED STATES et al., Defendants.

To the honorable judges of said court:

We hereby enter the appearance of the Interstate Commerce Commission as intervening defendant, and of ourselves as its counsel, in the above-entitled cause.

WALTER McFARLAND.
WALTER McFARLAND,
Counsel for Interstate Commerce Commission.

P. J. FARRELL.
P. J. FARRELL,
Of Counsel.

Washington, D. C.,
January 18, 1922.

Endorsements: In equity. No. 1235 Civil. In the District Court of the United States, District of Wyoming. Wyoming Railway Company, Complainant vs. United States et al., Defendants. Appearance of Interstate Commerce Commission as Intervening Defendant. Filed January 21, 1922. Charles J. Ohnhaus, Clerk. Walter McFarland, Counsel for Interstate Commerce Commission, Washington, D. C. P. J. Farrell, of Counsel.

38 In the District Court of the United States, District of Wyoming.

In Equity.

No. —.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES et al., Defendants.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and re-

serving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering the allegations contained in the bill of complaint, this intervening defendant, which for convenience will be referred to hereinafter as the Commission, admits and alleges that complainant, Wyoming Railway Company, is a common carrier engaged in the transportation of freight by railroad in interstate commerce; that a complaint was filed with the Commission on July 7, 1920, by the Pioneer Lumber Company and the Buffalo Lumber Company, and was docketed as No. 11608, as alleged in the bill of complaint; that answers to said complaint were filed with the Commission by various defendants named therein; that the full hearing provided for in the interstate commerce act was accorded to all interested parties; that at said hearing a large volume of testimony and other evidence, bearing upon the matters under investigation, was submitted to the Commission for consideration; that subsequently the questions
39 presented for decision were fully argued, both orally and in briefs, and the matters and things involved in said case were submitted to the Commission for determination, whereupon, on November 3, 1921, the Commission determined said questions and made its report, findings, and order in said docket No. 11608, Pioneer Lumber Co. v. Director General, 64 I. C. C., 485, which are attached to the bill of complaint, marked Exhibit A, and are referred to and made a part thereof by paragraph III of said bill.

The Commission further alleges that said findings were and are, and each — them was and is, fully supported and justified by the record before the Commission in said proceeding.

The Commission further alleges that in making said report, findings, and order it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by the allegations in the petition herein. The Commission further alleges that said report, findings, and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; and that in making them it did not exceed the authority duly conferred upon it, or exercise that authority in an unreasonable manner.

II.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill herein in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact included in the Commission's said report, findings, and order, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
WALTER McFARLAND,
By WALTER McFARLAND,
Counsel.

P. J. FARRELL.
P. J. FARRELL,
Of Counsel.

40 CITY OF WASHINGTON,
District of Columbia, ss:

B. H. Meyer, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named intervening defendant, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

B. H. MEYER.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia this 18th day of January, 1922.

[SEAL.] ALFRED HOLMEAD.

My Commission expires July 10, 1924.

Endorsements: In Equity, No. 1235 Civil. In the District Court of the United States, District of Wyoming. Wyoming Railway Company, Complainant, v. United States et al., Defendants. Answer of the Interstate Commerce Commission. Filed January 21, 1922, Charles J. Ohnhaus, Clerk. Walter McFarland, Counsel for Interstate Commerce Commission, Washington, D. C. P. J. Farrell, of Counsel.

41 In the District Court of the United States for the District of Wyoming.

Equity. No. 1235.

WYOMING RAILWAY COMPANY, Plaintiff,

vs.

UNITED STATES, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

Order.

This cause having come on to be heard before the Honorable Robert E. Lewis, Circuit Judge, Honorable John A. Riner and Honorable T. Blake Kennedy, District Judges, upon the application of the

plaintiff for a temporary injunction and restraining order, as prayed for in its said bill of complaint, and upon the motion of the defendant, United States, to dismiss the bill, and upon the answer of the Interstate Commerce Commission, Intervenor, filed herein, in compliance with the provisions of Section 1 of the District Court Jurisdiction Act of October 22, 1913, (38 Statutes at Large, 219). The Court, after hearing the arguments of counsel for the respective parties upon said motions, and being fully advised in the premises, doth order and adjudge as follows, to wit:

1. That the application of the plaintiff for a preliminary injunction, as prayed for in its bill of complaint, be, and the same is hereby denied, to which ruling and order the plaintiff by its counsel in open court duly enters its exceptions.

2. That the motion of the defendant, United States, to dismiss the bill of complaint be, and the same is hereby granted, and said
42 bill is hereby dismissed at the cost of the plaintiff, but without prejudice to the rights of the plaintiff, after its compensation out of the through rates has been determined to file a new bill to test the validity of such division, to which ruling and order the plaintiff in open court by its counsel enters its exception.

3. And thereupon the plaintiff by its counsel having signified its intention to appeal to the Supreme Court of the United States from this order. The Court, at the request of the counsel for the plaintiff fixes the amount of said appeal bond at the sum of Five Hundred dollars ($500.00), said bond to be presented with the plaintiff's assignment of errors and petition for appeal and such bond to be approved by one of the judges of this Court.

Dated this 21st day of January, A. D. 1922.

ROBT. E. LEWIS,
Circuit Judge.
JOHN A. RINER,
T. BLAKE KENNEDY,
District Judges.

Endorsements: Equity No. 1235. In the District Court of the United States for the District of Wyoming. Wyoming Railway Company, Plaintiff, vs. United States, Defendant, and Interstate Commerce Commission, Intervening Defendant. Order. Filed Jan. 21, 1922, Charles J. Ohnhaus, Clerk.

43 In the District Court of the United States for the District of Wyoming.

In Equity.

No. 1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant; INTERSTATE COMMERCE COMMISSION, Intervenor.

Petition for Appeal.

To the Honorable Robert E. Lewis, U. S. Circuit Judge; the Hon. orable John A. Riner, U. S. District Judge, and the Honorable T. Blake Kennedy, U. S. District Judge:

Now comes Wyoming Railway Company, a corporation, complainant in the above entitled cause, — feeling itself aggrieved by the final decree and order made and entered in this cause on the 21st day of January, A. D. 1922, denying the application of the complainant for a preliminary injunction, as prayed for in its bill of complaint, and sustaining and granting the motion of the defendant, the United States, to dismiss the bill of complaint, and dismissing the complainant's bill of complaint at its costs, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in its assignment of errors filed herewith, and it prays that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based may be duly authenticated by the Clerk of this court and sent to the United States Supreme Court sitting at Washington, D. C. And your petitioner further prays that a proper order*ed* touching the security to be required of it to perfect its appeal be made.

And your petitioner will ever pray.

Dated, February 14th, 1922.

W. T. ALDEN,
A. C. CAMPBELL,
Solicitors for Wyoming Railway Company, Petitioner.

ALDEN, LATHAM & YOUNG,
Of Counsel.

44 Endorsements: No. 1235. United States District Court District of Wyoming. Wyoming Railway Company vs. United States, Defendant, Interstate Commerce Commission, Intervenor. Petition for Appeal to Supreme Court of United States. Filed Feb. 16, 1922, Charles J. Obnhaus, Clerk. W. T. Alden, 134 S. La Salle St., Chicago, Ill., and A. C. Campbell, Cheyenne, Wyoming, Attorneys for Complainant.

45 In the District Court of the United States for the District of Wyoming.

In Equity.

No. 1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant; INTERSTATE COMMERCE COMMISSION, Intervenor.

Order Granting Appeal.

This cause coming on to be heard upon the application of the Wyoming Railway Company for an appeal from the decree and order of this Court of January 21, 1922,

It is ordered that the foregoing appeal be and the same is hereby allowed to the said Wyoming Railway Company in accordance with its application therefor this day made to this Court, upon the filing of a bond in the penal sum of Five Hundred Dollars ($500), with good and sufficient surety to be approved by one of the Judges of this court, conditioned that the said Wyoming Railway Company shall prosecute said appeal to effect and answer all damages and costs if said Wyoming Railway Company fail to make said appeal good.

Dated this 16th day of February, 1922.

T. BLAKE KENNEDY,
Judge of District Court.

Endorsements: No. 1235. United States District Court, District of Wyoming. Wyoming Railway Company vs. United States, Defendant, Interstate Commerce Commission, Intervenor. Order granting appeal. Filed Feb. 16, 1922, Charles J. Ohnhaus, Clerk. W. T. Alden, 134 S. La Salle St., Chicago, Ill. A. C. Campbell, Cheyenne, Wyoming, Attorneys for Complainant.

46 In the District Court of the United States for the District of Wyoming.

In Equity.

No. 1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant; INTERSTATE COMMERCE COMMISSION, Intervenor.

Assignment of Errors of Wyoming Railway Company, Complainant in the Above Cause.

And now, on this 16th day of February, A. D. 1922, comes the complainant, Wyoming Railway Company, a corporation, by its solicitors and counsel, William T. Alden and A. C. Campbell, and in connection with its petition for appeal, filed herein this day, and says that in the decree and order entered in the above entitled cause on the 21st day of January, 1922, manifest error intervened to its prejudice, and that said final decree and order is erroneous and unjust to the said complainant in the following particulars, to-wit:

1st. That the Court erred in overruling and denying the application of the complainant for a preliminary injunction, as prayed for in its bill of complaint.

2nd. That the Court erred in sustaining and granting the motion of the defendant, United States, to dismiss the bill of complaint.

3rd. That the Court erred in dismissing the complainant's bill of complaint and entering a judgment in favor of the defendant and against the complainant for costs of suit.

Wherefore, the complainant, Wyoming Railway Company, prays that the said order and decree be reversed, and that the said District Court be directed and instructed to issue the injunction prayed for in its bill of complaint, and that the said Court be further ordered, directed and instructed to enter its judgment and decree that
47 the order of the Interstate Commerce Commission, mentioned in said bill of complaint, made and entered on November 3, 1921, be annulled, suspended, set aside and held for naught, all as required by law.

W. T. ALDEN,
A. C. CAMPBELL,
Solicitors and Counsel for Wyoming Railway Company.

ALDEN, LATHAM & YOUNG,
Of Counsel.

Endorsements: No. 1235. United States District Court, District of Wyoming. Wyoming Railway Company vs. United States, Defendant. Interstate Commerce Commission, Intervenor. Assignment of Errors by Wyoming Railway Company. Filed Feb. 16, 1922, Charles J. Ohnhaus, Clerk. W. T. Alden, 134 S. La Salle St., Chicago, Ill., and A. C. Campbell, Cheyenne, Wyoming, Attorneys for Complainant.

48 Know all men by these presents that we, Wyoming Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wyoming, as Principal, and United States Fidelity & Guaranty Company, a corporation, as Surety, are held and firmly bound unto the United States and the Interstate Commerce Commission in the full and just sum of five hundred dollars ($500.00), to be paid to the said United States and Interstate Commerce Commission, their certain attorney or attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of February, One Thousand, Nine Hundred Twenty-two (1922).

Whereas, at a term of the District Court of the United States for the District of Wyoming, and on, to-wit: the 21st day of January, A. D. 1922, the same being one of the judicial days of the regular November, A. D. 1921, Term of the said court, and in a certain suit then and there pending in said court betwen the said Wyoming Railway Company as complainant, and the United States as defendant, and the Interstate Commerce Commission as intervenor, and known as cause No. 1235 in said court, an order and decree in said court were entered, denying the application of the complainant for a temporary injunction, as prayed for in its bill of complaint, and granting and sustaining the motion of the defendant, the United States, to dismiss the bill of complaint, and a judgment for costs was rendered against the said Wyoming Railway Company, and the Wyoming Railway Company presented to said court its petition for an appeal from said order, decree and judgment from the said court of the United States and having obtained from said court an order allowing an appeal to the Supreme Court of

49 the United States, and having filed a copy thereof in the Clerk's Office of the said court, to reverse the said order, decree and judgment in the aforesaid suit, and a citation directed to the said United States and Interstate Commerce Commission, citing and admonishing them to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C. within thirty (30) days from the date thereof:

Now, the condition of the above obligation is such that if the said Wyoming Railway Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fails to make this plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

WYOMING RAILWAY COMPANY,
By WILLIAM G. DOWS, *President.*

Attest:
[SEAL.] W. T. ALDEN,
Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY, [SEAL.]
By CHARLES M. DALEY,
Attorney in Fact.

Countersigned by
W. C. BOND & CO.,
General Agents for Wyoming.

Approved:
T. BLAKE KENNEDY,
Judge, District Court.

Endorsements: No. 1235. United States District Court for the District of Wyoming. In Equity. Wyoming Railway Company vs. United States. Appeal Bond of the Plaintiff on Appeal to Supreme Court of the United States. Filed Feb. 16, 1922. Charles J. Ohnhaus, Clerk. W. T. Alden, Chicago, Illinois, A. C. Campbell, Cheyenne, Wyoming, Attorneys for Plaintiffs.

50 In the District Court of the United States for the District of Wyoming.

In Equity.

No. 1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant; INTERSTATE COMMERCE COMMISSION, Intervenor.

On motion of Wyoming Railway Company, complainant herein, by William T. Alden, and A. C. Campbell, its solicitors, entered herein this 16th day of February, 1922, it is ordered that the appeal bond of said Wyoming Railway Company, with The United States Fidelity & Guaranty Company as surety, this day presented on its appeal from the decree and order of this Court of January 21, 1922, heretofore allowed, be and the same is hereby approved.

Enter.

T. BLAKE KENNEDY,
Judge of the District Court.

Endorsements: No. 1235. United States District Court, District of Wyoming. Wyoming Railway Company vs. United States, Defendant, Interstate Commerce Commission, Intervenor. Order Ap-

proving Appeal Bond. Filed Feb. 16, 1922. Charles J. Ohnhaus, Clerk. W. T. Alden, 134 S. La Salle St., Chicago, Ill., and A. C. Campbell, Cheyenne, Wyoming, Attorneys for Complainant.

51 In the District Court of the United States for the District of Wyoming.

Civil. #1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Citation.

To the United States, the Defendant, and to the Interstate Commerce Commission, Intervenor, Gretings:

You are here cited and admonished to be and appear in the Supreme Court of the United States at Washington, in the District of Columbia, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed and filed in the office of the Clerk of the United States District Court, within and for the District of Wyoming, wherein Wyoming Railway Company is appellant, and you are appellees, to show cause, if any there be, why the Order dismissing the Bill of Complaint in said cause should not be corrected, and why speedy justice should not be done in its behalf.

Witness the Honorable T. Blake Kennedy, Judge of the United States District Court, for the District of Wyoming, this 21 day of February A. D. 1922.

T. BLAKE KENNEDY,
Judge.

Service of the above and foregoing Citation on Appeal is hereby accepted on behalf of the United States.

Dated February 21st, 1922.

ALBERT D. WALTON,
United States Attorney, District of Wyoming.

52 [Endorsed:] In the District Court of the United States for the District of Wyoming. Wyoming Railway Company, Complainant, vs. United States, Defendant. Civil #1235. Citation. Filed Feb. 21, 1922. Charles J. Ohnhaus, Clerk.

53 In the District Court of the United States for the District of Wyoming.

No. 1235. Civil.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant; INTERSTATE COMMERCE COMMISSION, Intervenor.

Be it remembered That on the 21st day of January, A. D. 1922, the same being one of the juridical days of the regular November, A. D. 1921 term of the District Court of the United States for the District of Wyoming, the above entitled cause came on for hearing before the Honorable Robert E. Lewis, U. S. Circuit Judge, the Honorable John A. Riner and the Honorable T. Blake Kennedy, U. S. District Judges, on the application of the complainant for a temporary injunction, the defendant's motion to dismiss the bill of complaint, and the answer filed by intervenor, the complainant appearing by W. T. Alden, and A. C. Campbell, Esquires, its attorneys, the defendant appearing by Albert D. Walton, Esquire, United States Attorney, and the intervenor appearing — Walter MacFarland, Esquire, its Attorney.

Thereupon counsel for all parties made oral argument to the court. Thereupon, and upon consideration thereof, the court delivered the following oral opinion:

The Court (by Judge Lewis): It appears from the bill of complaint in this case that the Pioneer Lumber Company and the Buffalo Lumber Company complained before the Interstate Commerce Commission against the Director General of Railroads, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, the Great Northern Railway Company, the Northern Pacific Railway Company, the Spokane,
54 Portland & Seattle Railway Company, and the Wyoming Railway Company, for violation of the first three sections of the Interstate Commerce Act. On hearing before the Commission it was found that there had been no violation of sections one and two, but that the practice of all of the defendants in putting in effect a rate of 81½¢ on lumber from Washington and Pacific Coast points to Ucross and Buffalo, and a rate of 72½¢ from points in the Spokane group to Ucross and Buffalo, was unduly prejudicial to the Pioneer Lumber Company, to the Buffalo Lumber Company, and to the two localities of Ucross and Buffalo.

That conclusion was arrived at on account of the blanket rates to Clearmont, Sheridan, Alliance, Edgemont, Deadwood, Spearfish, and other points being 25¢ lower than to Ucross and Buffalo, and that Ucross and Buffalo being in the same section or territory, this worked undue prejudice to the two complainants and to these locali-

ties, and on that the Commission made its order finding that these defendants, acting together, should put in a new rate to Buffalo and Ucross in order to remove that undue prejudice to these two localities and to the two complainants. The higher rates to Ucross and Buffalo were brought about by adding the complainant's local rate to the blanket rate at Clearmont, the junction point.

Now, the third section of the Interstate Commerce Act undoubtedly vests the Commission with power to take such action as may be necessary to remove undue prejudice to shippers and localities located in the same general section of the country. That appears to be a part of their duties and the purposes of establishing the Commission. Much has been said on the part of the complainant as to the present blanket rates, and that its share of those two rates, if they are to prevail, will be so small that the compensation to it will be confiscatory.

We are of the opinion that this court cannot assume that the present blanket rates will stand if, in the pro-rating, they will work confiscation of the complainant's property. Counsel for the
55 Government and counsel for the Commission have indicated several ways in which that may be avoided. If the present rates are to stand, that is, if the present blanket rates are to be applied to Buffalo and Ucross the carriers west of Billings may be required to contribute a part of their present share of those rates, and the Burlington may likewise be required to contribute a part of its share of those rates south of Billings, so as to make up to the complainant the necessary compensation for the haul from Clearmont to Ucross and Buffalo, in order that confiscation may be avoided. Again, the carriers may have the right to raise the blanket rates to the extent of equalizing them to the Ucross and Buffalo rates.

We all agree that in the present status of the proceeding this court is without power to take action, that the rights of the Wyoming Railway Company under the order of the Commission have not yet been determined, and it is impossible to know whether or not the action of the defendants in obeying the order of the Commission will result in confiscation. We understand that the Interstate Commerce Act empowers the Commission to adjust a proportionate division of a through rate between common carriers where they are unable themselves to agree upon it. For these reasons we are of opinion that the application for a temporary injunction should now be denied.

There is a motion on the part of the United States to dismiss; and while the Commission has answered it is, practically, a motion to dismiss also on its part, because it justifies, and does no more than justify, the action that it took in ordering the extension of the same rates to Buffalo and Ucross as to other towns in this general section of the country. We think the bill should be dismissed.

Mr. Alden: I think, if the Court please, that there should be in the record of this case, when it goes to the Supreme Court a certified copy of the record of the proceedings before the Interstate Commerce

Commission. I have a copy of the record here and of the exhibits.
I thought it was certified, but I find it was not. I did not
56 know that until I got on the train. I want that to go into the
record, on appeal. We have, I believe, thirty days to appeal. Of course, if the bill is dismissed that is a final order and disposes of the case, and there is no question about that being appealable. I believe under the statutes it is appealable for either side. Either side can appeal from the order either granting or denying the motion. If the court dismisses the bill there is no question about that. But I would like to have it understood that a certified copy of the evidence and the pleadings in the case of the Pioneer Lumber Company against the Director General of Railroads, No. 11608, shall be made a part of the record in the case on appeal. If counsel has any objection because it is not certified, we could have this copy certified and use it.

Mr. MacFarland: So far as we are concerned, while I could not agree to have it put in uncertified, we offer no objection to having it certified, if the court is willing to have that done. We are entirely willing to leave that to the court.

The Court (by Judge Riner): Any objection to having it certified and then filed as of today?

Mr. MacFarland: Not so far as we are concerned.

Mr. Walton: The United States has no objection.

The Court (by Judge Riner): I think the order should be, dismissed without prejudice, so that if you find that the rate is confiscatory you will have the right to bring an action again by filing a new bill. I think the order should be in that form. Is that satisfactory?

The Court (by Judge Lewis): Yes, that is satisfactory.

Mr. Alden: That is the order I would like to have, if it is agreeable to counsel, and it appears to be. We will perfect our appeal within thirty days.

The Court (by Judge Lewis): What should the bond be on error? Is $500 sufficient?

The Court (by Judge Riner): Yes.

57 The Court (by Judge Lewis): Make the bond $500 on error.

The Court (by Judge Riner): I think that record you seek to offer should be marked by the clerk or by the stenographer, to show that the record which you now offer is the one to be certified.

(Said record was thereupon marked by the reporter Plaintiff's Exhibit No. 1.)

Mr. MacFarland: Do your Honors care to have us prepare the order, that is, counsel agree on the form?

The Court (by Judge Riner): If it is in your favor you should prepare the order. Another thing, you will have to take exceptions if you want to take it to the Supreme Court. Do you want your exceptions noted, Mr. Alden?

Mr. Alden: Yes, I wish my exceptions noted to the order of the court. I want an exception to the court's denying the motion for a

restraining order, of course, an exception to the order of the court in sustaining the motion to dismiss the bill.

Mr. MacFarland: We could put that right in the order, so it would show up.

The Court (by Judge Lewis): Yes. You consult with the clerk about the form of the order and prepare it for the signatures of the three judges.

The above and foregoing, together with the oral arguments of counsel, constitutes a true and correct transcript of the entire proceedings had in said cause on said date.

And inasmuch as the matters hereinabove set forth do not fully appear of record in this cause, and to the end that the same may be and become a part of the record in this cause, the Wyoming Railway Company hereby tenders this, its Certificate of Evidence and exceptions to the rulings of the court made and entered during the
58 course of the said hearing, and prays that the same may be duly certified under the hand and seal of the Judges of this court, and thereby made a part of the record in this cause, and that the said Plaintiff's Exhibit No. 1, filed in this cause as of this date, be made a part of the record in this cause, and it is hereby certified accordingly this 16th day of February, A. D. 1922.

——— ———, [SEAL.]
U. S. Circuit Judge.

——— ———, [SEAL.]
T. BLAKE KENNEDY, [SEAL.]
Judges of the U. S. District Court.

Presented in open court this 16th day of February, A. D. 1922.

T. BLAKE KENNEDY,
Judge.

Endorsements: No. 1235. United States District Court, District of Wyoming. Wyoming Railway Co., vs. United States, Deft., Interstate Commerce Commission, Intervenor. Certificate of Evidence and Exceptions. Filed Feb. 16, 1922. Charles J. Ohnhaus, Clerk. W. T. Alden, 134 S. La Salle St., Chicago, Ill., and A. C. Campbell, Cheyenne, Wyoming, Attorneys for Complainant.

59 In the District Court of the United States for the District of Wyoming.

Civil. #1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Præcipe for Transcript.

To the Clerk of the above named Court:

Please prepare and certify, as the record on appeal in the cause above entitled, the following:

1. Bill of Complaint.
2. Notice.
3. Order setting hearing.
4. Motion to Dismiss.
5. Order allowing Intervention.
6. Appearance of Interstate Commerce Commission.
7. Answer of the Interstate Commerce Commission.
8. Order Dismissing the Bill of Complaint.
9. Petition for Appeal.
10. Order Granting the Appeal.
11. Assignment of Errors.
12. Bond.
13. Order Approving Bond.
14. Citation.
15. Certificate of Evidence.
16. Præcipe for Transcript.
17. Certified copy of the pleadings, evidence and exhibits Cause #11608 I. C. C.
18. Stipulation extending time to file record U. S. S. Court.
19. Order extending time to file record U. S. Supreme Court.

W. T. ALDEN,
A. C. CAMPBELL,
Attorneys for Appellant.

Endorsements: No. 1235, Civil. In the District Court of the United States for the District of Wyoming. Wyoming Railway Company, Complainant, vs. United States, Defendant. Civil #1235. Præcipe for Transcript. Filed Feb. 16th, 1922. Charles J. Ohnhaus, Clerk.

60 Interstate Commerce Commission,

Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of complaint, filed July 7, 1920; answers of John Barton Payne, Director General of Railroads, as Agent, filed August 2, 1920, Chicago, Milwaukee & St. Paul Railway Company, filed August 4, 1920, Great Northern Railway Company and Northern Pacific Railway Company, filed August 9, 1920, Chicago, Burlington & Quincy Railroad Company, filed August 18, 1920, Wyoming Railway Company, filed September 13, 1920, and Joint Answer of Spokane, Portland & Seattle Railway Company and Oregon Trunk Railway, filed August 9, 1920; Transcript of Stenographer's notes of the hearing held September 16 and 17, 1920, at Spokane, Washington, before Examiner F. W. McM. Woodrow, and exhibits filed at this hearing as a part of the testimony; and report proposed by Examiner F. W. McM. Woodrow, filed May 7, 1921, in case No. 11608, Pioneer Lumber Company, and others, against John Barton Payne, Director General of Railroads, as Agent, Chicago, Burlington & Quincy Railroad Company, and others, the originals of which are now on file and of record in the office of this Commission.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Commission this 15th day of February, A. D., 1922.

[Seal of Interstate Commerce Commission. 1887.]

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Plaintiff's Exhibit (1).
Filed January 21, 1922.
CHARLES J. OHNHAUS,
Clerk.

61 Copy.

Docket No. 11608.

Formal Complaint.

Filed Jul. 7, 1920. Interstate Commerce Commission.

Before the Interstate Commerce Commission.

Docket 11608.

PIONEER LUMBER COMPANY, BUFFALO LUMBER COMPANY, Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, and Chicago, Milwaukee & St. Paul Railway Company, Chicago, Burlington & Quincy Railroad Company, The Great Northern Railway Company, Northern Pacific Railway Company, Oregon Trunk Railway Company, Spokane, Portland & Seattle Railway Company, Wyoming Railway Company, Defendants.

The petition of the above named complainants respectfully shows:

I.

That they are corporations, incorporated under the State laws of Wyoming, engaged in the retail lumber and fuel business, and that their principal place of business is located in the city of Buffalo, state of Wyoming.

II.

That defendant, John Barton Payne, Director General of Railroads, as Agent, is an officer of the United States of America, designoted by the President thereof; pursuant to the provisions of Section 206 of the Transportation Act, 1920; that the railroads and systems of transportation over whose lines or routes the rates, charges and regulations complained of herein applied and which during Federal control were operated by the Director General of Railroads, are as follows: Chicago, Burlington & Quincy Railroad Company;
62 Chicago, Milwaukee & St. Paul Railway Company; The Great Northern Railway Company; Northern Pacific Railway Company; Oregon Trunk Railway Company and the Spokane, Portland & Seattle Railroad Company.

III.

That the defendants above named are common carriers engaged in the transportation of passengers and property, wholly by railroad, in

the United States and more particularly between points in the States of Washington, Idaho, Montana and Wyoming, and points outside of said states, and as such common carriers are subject to the provisions of the Act to Regulate Commerce, as approved February 4, 1887, and acts amendatory thereof or supplementary thereto, and the Federal Control Act.

IV.

That complainants in the course of their business, caused to be shipped various cars of brick, lumber, shingles and posts to their yards at Buffalo and Ucross, Wyoming, more specifically shown in Exhibits "A," "B," "C," "D" and "E," which exhibits show routes, points of origin, points of destination, rates, tariff references and charges collected, all of which exhibits are made a part of this complaint.

V.

That on or about May 25, 1918, the Director General of Railroads issued his General Order No. 28, and thereby ordered all existing freight rates on all traffic carried by all railroad lines under
63 Federal control to be increased, effective June 25, 1918. An exhibit attached to the order indicated the extent of increases on the different commodities and the manner in which they were to be made. Pursuant to General Order No. 28, the defendants all published tariffs increasing their rates on the different commodities between points of origin and destination as more specifically shown in Exhibits "A," "B," "C," "D" and "E" attached hereto, and by reason of the method used in publishing rates, wherein they increased each separate factor of a combination rate, have exacted charges that are injust and unreasonable and in violation of Section 1 of the Act to Regulate Commerce, as amended.

VI.

That by reason of the manner in which the defendants complied with the Director General's Order No. 28, increasing each unit of a combination rate, instead of applying the increase to the through combination of rates, they have exacted charges that result in unjust discrimination in violation of Section 2 of the Act to Regulate Commerce, as amended.

VII.

Further, the rates published on lumber, shingles and posts in defendant's tariffs G. N. Ry. I. C. C. A-4858, N. P. Ry. I. C. C. 6833, R. H. Countiss (Agent) I. C. C. 1058 and Wyo. Ry. I. C. C. 31, are unduly preferential against and disadvantageous to complainants, in that defendants have refused to publish through rates to points on the Wyoming Railway Company, although it is the long estab-

lished practice on part of the defendants, other than the Wy-
64 oming Railway Company, to publish blanket rates on these commodities in the territory described in Paragraph III, which is undue preference in favor of complainant's competitors located on the Chicago, Burlington & Quincy Railroad Company, and which is in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce, as amended, and the Federal Control Act.

VIII.

That by reason of the facts stated in paragraphs V, VI and VII, complainants have been and still are subjected to the payment of charges for transportation which, when exacted, are unjust, unreasonable and unjustly discriminatory, in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce, as amended, also in violation of Section 10 of the Federal Control Act.

IX.

Wherefore, complainants pray that defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants to publish just and reasonable through interstate rates for the future, and that each of them be ordered to pay to complainants by way of reparation for the unlawful charges hereinbefore alleged, the difference between the charges assessed as shown in Exhibits "A", "B", "C", "D" and "E" attached hereto, and charges based on rates found to be reasonable, also that they be ordered to pay to complainants reparation on all other shipments of the same commodities, that have moved or may
move between date of this complaint and date of final settle-
65 ment and that such other or further order or orders be made as the Commission may consider proper in the premises.

PIONEER LUMBER COMPANY,
BUFFALO LUMBER COMPANY,
(Signed) By R. S. BROWN,
Traffic Counsel.

Dated, Spokane, Washington,
May 15, 1920.

Address all future correspondence relating to this complaint to: R. S. Brown, 308 Columbia Bldg., Spokane, Washington.

Originally received, Date, May 20, 1920. Returned for correction, Date, June 4, 1920.

EXHIBIT "A."

Consignee, Pioneer Lumber Company.

Route, Chicago, Burlington & Quincy R. R. Co.—Wyoming Railway Co.

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
C. of G.	4409	359	6-14-19	Sheridan, Wyo.....	Buffalo, Wyo.....	Brick	53025	17	90.13
						Flue Lin.....	1970	47½	9.36
Milw.	500667	5034	6-10-19	do.	do.	Com. Brick.....	52250	17	88.83
D. & H.	22350	445	4-17-19	do.	do.	Com. Brick.....	52250	17	88.83
S. S. W.	40177	903	10-29-19	do.	do.	Com. Brick.....	52250	17	88.82
						Fire Clay.....	500	47½	2.38
C., B. Q.	120001	56	10- 3-19	do.	do.	Com. Brick.....	52250	17	88.82

Authority: C., B. & Q. R. R. I. C. C. No. 10610.
Wyoming Ry. I. C. C. No. 31.

EXHIBIT "B."

Consignee, Pioneer Lumber Company.

Route, C., M. & St. P. R. R.—N. P. R. R.—C., B. & Q. R. R.—Wyo. Ry.

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
Milw.	207291	M15	10-13-19	National, Wn.....	Buffalo, Wyo.....	Fir Lbr.....	79800	65	518.70

Authority: R. H. Countiss I. C. C. No. 1058—Wyo. Ry. I. C. C. No. 31.

N. P.	37448	M77	4-14-19	Eatonville, Wn.....	Ucross, Wyo.....	Fir Lbr.....	75600	54	408.24

Authority: R. H. Countiss I. C. C. No. 1008—Wyo. Ry. I. C. C. No. 31.

EXHIBIT "C."

Consignee, Pioneer Lumber Company.

Route, G. N. R. R.—C., B. & Q. R. R.—Wyo. Ry.

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
G. N.	22574	F2	1- 1-19	Libby, Mont.....	Buffalo, Wyo.....	Pine Lbr.....	64140	58	372.01
Sou.	15576	F24	3-15-19	do.	do.	Pine & Larch.....	57980	58	336.26
—. —.	13976	F25	3-11-19	do.	do.	do.	90780	58	526.52
Milw.	85014	F50	2-25-19	do.	do.	do.	70845	58	410.90
N. P.	138401	F79	8-27-18	do.	do.	do.	69260	58	401.71

Authority: G. N. I. C. C. No. A-4006—Wyo. Ry. I. C. C. No. 31.

67

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
N. P.	27298	F98	10-30-19	Libby, Mont.....	Buffalo, Wyo.....	Pine Lbr.....	64620	58	374.80
I. C. L.	17213	F95	10-10-19	do.	do.	do.	54220	58	314.50
N. Y. C.	120525	92	9-19-19	Bonner's Ferry, I..	do.	Ced. posts.....	29220	58	168.48
P. M.	30359	F100	5-21-19	Priest River, I.....	do.	do.	35300	58	204.74
B. & M.	64444	F19	6- 2-19	Libby, Mont.....	do.	Lumber	50440	58	292.55
G. N.	220165	F39	6-11-19	Albany, Falls, I...	do.	Ced. Lbr.....	33420	68	227.26

Authority: G. N. I. C. C. No. A-4858—Wyo. Ry. I. C. C. No. 31.

EXHIBIT "D."

Consignee, Pioneer Lumber Company.

Route, N. P. R. R.—C., B. & Q. R. R.—Wyo. Ry.

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
G. N.	10870	196	6-17-19	Clear Lake, Wn....	Buffalo, Wyo.....	Fir Lumber.....	68780	65	447.13
Sou.	36083	28	5- 5-19	Whites, Wn.....	do.	Shingles	30840	75	231.30
L. V.	80328	159	3-15-19	Enumclaw, Wn....	do.	Fir Lumber.....	56380	65	366.47
C. N. W.	102449	977	4-16-19	Tacoma, Wn.....	do.	do.	76450	65	496.97
Milw.	50594	152	11- 4-18	Montesano, Wn.....	do.	do.	45380	65	293.97
D. Q. E.	920	113	3-12-19	Enumclaw, Wn....	do.	do.	56300	65	365.95
G. H. S. A.	34506	352	10-31-18	Tacoma, Wn.....	do.	do.	63960	65	415.74
T. H. B.	3142	F34	8-20-18	Orting, Wn.....	Ucross, Wyo.....	do.	68900	54	372.06
H. V.	20612	156	8-13-18	Sumner, Wn.....	Buffalo, Wyo.....	do.	72400	65	470.60
A. V.	20190	B25	1-20-19	Tacoma,, Wn.....	do.	Shingles	25300	75	189.75
						Fir Lumber.....	14250	65	92.62

Authority: R. H. Countiss I. C. C. No. 1003—Wyo. Ry. I. C. C. No. 31.

P. R. R.	15862	57	6- 9-19	Kootenai, Ida.....	Ucross, Wyo.....	Cedar Post.....	37820	47	177.76
P. R. R.	285659	167	8-14-19	Standpoint, Ida....	Buffalo, Wyo.....	Cedar Lbr.....	49100	68	333.88
G. N.	37805	351	8-29-19	do.	do.	Pine & Lath.....	26515	58	153.79
						Cedar Lbr.....	32785	68	222.94
N. P.	71416	331	6-19-19	do.	do.	do.	42500	68	289.00
Erie	69562	54	6- 7-19	Kootenai, Ida.....	do.	Cedar Post.....	30140	58	174.81
P. & R.	4199	21	3-20-19	Heron, Mont.....	Ucross, Wyo.....	do.	37600	47	176.72
Q.	101128	15	3-20-19	do.	Buffalo, Wyo.....	do.	41300	58	239.54
Q.	105683	17	2-17-19	do.	do.	do.	41640	58	241.51

Authority: N. P. I. C. C. No. 6252—Wyo. Ry. I. C. C. No. 31.

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
C. N. W.	55603	34	9- 6-19	Little Rock, Wn...	Buffalo, Wyo.....	Fir Lbr.....	94580	65	614.77
Authority: R. H. Countiss I. C. C. No. 1058—Wyo. Ry. I. C. C. No. 31.									
M., K. T.	63838	85	9-27-19	Kootenai, Ida.....	Buffalo, Wyo.....	Cedar Post.....	56060	58	325.15
Authority: N. P. I. C. C. No. 5833—Wyo. Ry. I. C. C. No. 31.									
Consignee, Buffalo Lumber Company.									
Route, N. P. R. R.—C., B. & Q. R. R.—Wyo. Ry. Co.									

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
B. 4	43306	46	4- 4-19	Alice Spur, I.....	Buffalo, Wyo.....	Cedar P-sts.....	38100	58	220.98
Authority: N. P. I. C. C. 6251—N. P. I. C. C. 6252—Wyo. Ry. I. C. C. 31.									
S. P.	85104	71	3-10-19	Standpoint, Ida....	Buffalo, Wyo.....	Cedar Lbr.....	49600	68	337.28
Authority: N. P. I. C. C. 6252—Wyo. Ry. I. C. C. 31.									
N. Y. C.	189375	28	5-30-19	Globe, Wash.....	Buffalo, Wyo.....	Shingles	24040	75	180.30
Mil.	500855	18	10-14-18	do.	do.	Fir Lumber.....	71720	65	466.18
Mil	210684	2	1- 6-19	do.	do.	Siding	6020	75	.....
						Fir Lumber.....	61270	65	443.47
B. & O.	75690	9	3- 9-20	do.	do.	Fir Lumber.....	61120	65	397.28
P. M.	53305	15	10- 7-19	do.	do.	Shingles	8550	75	.....
						Fir Lumber.....	49610	65	386.60
C. R. R. J.	12968	35	10-18-19	do.	do.	Shingles	29760	75	223.20
U. P.	72741	60	10-31-19	do.	do.	Fir Lumber.....	58720	65	381.68
G. N. W.	522295	14	2- 5-20	do.	do.	Fir Lumber.....	76900	65	499.85
Authority: R. H. Countiss I. C. C. No. 1003 and 1058—Wyo. Ry. I. C. C. No. 31.									

EXHIBIT "E."

Consigned, Pioneer Lumber Company.

Route, Oregon Trunk Ry. Co.—S. P. & S. R. R.—N. P. Ry.—C., B. & Q. R. R.

Car number.		Way-bill reference.		Origin.	Destination.	Commodity.	Weight.	Rate chgd.	Frt. paid.
C. N. J.	12539	L-161	12-10-18	Bend, Ore.....	Buffalo, Wyo.....	Pine Lbr.....	53560	59	316.00
B. A.	37381	K-112	11-11-18	do.	do.	do.	50180	65	326.17

Authority: N. P. I. C. C. 6252—Wyo. Ry. I. C. C. 31.

69 Filed Aug. 2, 1920. Interstate Commerce Commission. E. H.

Before the Interstate Commerce Commission.

I. C. C. Docket No. 11608.

PIONEER LUMBER COMPANY et al.

v.

DIRECTOR GENERAL, as Agent; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.

The Answer of John Barton Payne, Director General of Railroads, as Agent under the Transportation Act.

For answer to the complaint or so much thereof as he is advised it is necessary for him to answer this defendant says:

1. He avers that he is Agent under the Transportation Act, and as such is exercising the powers vested in and duties assigned him.

2. He admits that prior to his designation as Agent Walker D. Hines was Agent or Director General of Railroads, and as such exercised the powers vested in and the duties assigned him.

3. He refers to the tariffs named in the complaint and to all other tariffs applicable for a correct statement of the rates referred to or complained of herein.

4. He says that there was made the Director General's Order No. 28, effective June 25, 1918, and he avers that it was therein found by the Director General and certified to this Commission that in order to defray the expenses of Federal Control and operation,
70 fairly chargeable to railway operating expenses and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit, it was necessary to increase the railway operating revenue, also that in the Director General's opinion the public interest required a general advance in freight rates, passenger fares and baggage charges, as therein provided.

5. He denies that he as Agent or his predecessor, either as Agent or as Director General, has violated or is violating Section 1, 2 or 3 of the Act to Regulate Commerce, or Section 10 of the Federal Control Act, as alleged in the complaint, or that anything done or omitted by him, as Agent or his predecessor as Director General or as Agent, with respect to the subject matter of the said complaint, is in violation of law, or that he should be subjected to any averse order, and he denies that the complainant has been in any way damaged or is entitled to the relief prayed or to any other relief.

6. Each and every allegation in the complaint, touching anything alleged to have been done or omitted to be done by him as Agent or his predecessor as Director General or as Agent, not hereinbefore admitted or denied, is hereby specifically denied.

And having fully answered he prays that the complaint may be dismissed.

JOHN BARTON PAYNE,
Agent,

(S.) By JOHN F. FINERTY,
Assistant General Counsel,
U. S. Railroad Administration.

Washington, D. C., July 29, 1920.

71 Before the Interstate Commerce Commission.

Docket 11608.

PIONEER LUMBER COMPANY, BUFFALO LUMBER COMPANY, Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, Chicago, Burlington & Quincy Railroad Company et al., Defendants.

Answer of C., M. & St. P. Ry. Co.

Filed Aug. 4, 1920. Interstate Commerce Commission. E. H.

The separate answer of the defendant, Chicago, Milwaukee & St. Paul Railway Company, to the petition of complainant in the above entitled proceedings, respectfully shows:

I.

Answering paragraph I, this defendant admits the averments.

II.

Answering paragraph II, this defendant states that the allegations therein stated do not refer to this defendant and therefore it is not required, under the law, to answer same.

III.

Answering paragraph III, this defendant states that prior to December 28, 1917, and subsequent to March 1, 1920, it was a common carrier subject to the Act to Regulate Commerce.

72 IV.

Answering paragraph IV, this defendant has not knowledge or information sufficient to verify the averments thereof, and therefore, neither admits nor denies the same, but asks that strict proof thereof be required.

V.

Answering paragraph V, this defendant states that General Order No. 28 was promulgated by the Director General of Railroads and was put into force by his Agents, and it denies that said rates so published were in violation of law, as is alleged in said paragraph or in paragraph VI.

VI.

Answering paragraph VII, this defendant states that the tariffs lawfully on file with the Interstate Commerce Commission will show whether or not the facts alleged in said paragraph are true or otherwise.

Further answering said paragraph, this defendant denies that said rates as charged by it were in violation of the law, as is alleged in said paragraph.

VII.

Answering paragraph VIII, this defendant denies the allegations therein contained.

VIII.

73 Answering paragraph IX, this defendant denies that complainant is entitled to the prayer of its complaint as prayed, or otherwise.

IX.

Further answering, this defendant denies each and every allegation in said complaint contained not hereinbefore admitted, denied or otherwise answered unto.

Wherefore, having fully answered petition of complainant, this defendant prays that it be dismissed hence.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

(S.) By O. W. DYNES,
J. N. DAVIS,
Its Attorneys.

Dated at Chicago, Ill.,
August 2, 1920.

74 Before the Interstate Commerce Commission.

I. C. C. Docket No. 11608.

PIONEER LUMBER COMPANY, BUFFALO LUMBER COMPANY, Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, et al., Defendants.

Answer of Great Northern Railway Company.

Filed Aug. 9, 1920. Interstate Commerce Commission. E. H.

Defendant, Great Northern Railway Company, for answer to the complaint in this proceeding respectfully states:

1. Admits that it is a corporation engaged in business as a common carrier, as alleged in the complaint.

2. Refers to the tariffs covering the rates named in the complaint and to all other tariffs applicable for a correct statement of the rates referred to or complained of herein, and admits the said rates so far as the same appear in said tariffs.

3. Denies that it or any of the defendants herein named has violated or is violating any of the statutes or laws of the United States, or that anything done or omitted by it or any of them with respect to the subject matter of the said complaint is in violation of law; denies that any of the rates referred to in said complaint are unreasonable, prejudicial, discriminatory or unlawful, or that complainants have been charged or have paid any unreasonable, prejudicial, discriminatory or unlawful charges, and denies that it or any of the defendants should be subjected to any adverse order, and denies that the complainants are entitled to the relief prayed
75 for or any other relief.

4. Each and every allegation of the complaint not hereinbefore admitted is hereby specifically denied.

Wherefore, this defendant prays that the complaint in this proceeding be dismissed.

(S.) T. G. DORETY,
(S.) R. J. HAGMAN,
Attorneys for Defendant Great Northern Railway Company.

1120 Great Northern Building,
St. Paul, Minnesota.

76 Before the Interstate Commerce Commission.

Docket No. 11608.

PIONEER LUMBER COMPANY et al., Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, et al., Defendants.

Answer of Northern Pacific Railway Company.

Filed Aug. 9, 1920. Interstate Commerce Commission. E. H.

Now comes the Northern Pacific Railway Company, and for its answer to the complaint of the complainant herein, admits the allegations contained in paragraphs I, II, and III of said complaint, and denies the remaining averments thereof.

NORTHERN PACIFIC RAILWAY COMPANY,

(S.) By D. F. LYONS,
B. W. SCANDRETT,
Its Attorneys.

77 Before the Interstate Commerce Commission.

Docket No. 11608.

PIONEER LUMBER COMPANY et al.

v.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.

Answer of Chicago, Burlington & Quincy Railroad Company.

Filed Aug. 18, 1920. Interstate Commerce Commission. E. H.

Now comes the Chicago, Burlington & Quincy Railroad Company, defendant herein, and for its separate answer respectfully shows:

I.

It admits that it is a common carrier, subject to the Act to Regulate Commerce, as amended.

II.

Defendant refers to the tariffs named in the complaint, and to all other tariffs naming rates which may be involved in the allegations

thereof, all of which are lawfully on file with the Interstate Commerce Commission, for a correct statement of the rates referred to or complained of in said complaint.

III.

Defendant denies that it has violated or is violating Sections 1 or 2 or 3 of the Act to Regulate Commerce or Section 10 of the Federal Control Act, or any Section thereof, as alleged in the said complaint, or that it has done or omitted to do anything
78 with respect to the subject matter of the said complaint which is in violation of law, and denies that the complainants are entitled to the reparation or relief prayed for, or to any reparation or relief whatsoever.

IV.

Except as herein admitted, or otherwise answered, defendant denies each and every allegation, matter and thing in the said complaint contained.

Wherefore, having fully answered the said complaint, defendant prays that the same may be dismissed as to it.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
(S.) By KENNETH F. BURGESS,
General Attorney.

I hereby certify that I have served copy of the above and foregoing answer upon complainants by depositing same in the United States mail, postage prepaid, addressed to Mr. R. S. Brown, 308 Columbia Building, Spokane, Wash.

(S.) By KENNETH F. BURGESS,
General Attorney.

Chicago, Ill.,
August 14, 1920.

79 Before the Interstate Commerce Commission.

Docket No. 11608.

PIONEER LUMBER COMPANY, BUFFALO LUMBER COMPANY, Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, and Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee & St. Paul Railway Company, The Great Northern Railway Company, Northern Pacific Railway Company, Oregon Trunk Railway Company, Spokane, Portland & Seattle Railroad Company, Wyoming Railway Company, Defendants.

Answer of Wyoming Railway Company.

Filed Sep 13, 1920. Interstate Commerce Commission. M. E. N.

Now comes the Wyoming Railway Company, defendant herein, and for its separate answer respectfully shows:

I.

It admits the allegations contained in paragraph I of the complaint.

II.

It admits the allegations contained in paragraph II of the complaint.

III.

It admits that it is a common carrier engaged in the transportation of passengers and property wholly by railroad in the United States; that it actually owns and operates only about 29
80 miles of road, extending from the town of Clearmont, Wyoming, on the Chicago, Burlington & Quincy Railroad, to the city of Buffalo, Wyoming, and it admits that as such common carrier it is subject to the provisions of the Act to Regulate Commerce.

IV.

That it has not knowledge nor information sufficient to verify the averments of paragraph IV of the complaint, and therefore neither admits nor denies the same, but asks that strict proof thereof be made.

V.

It admits that General Order No. 28 was promulgated by the Director General of Railroads, and that accordingly increased freight rates, as provided in such order, were published and enforced, but it denies that said rates so published were in violation of law and were and are unjust and unreasonable and in violation of Section 1 of the Act to Regulate Commerce.

VI.

That it denies that it has exacted any charges that result in unjust discrimination in violation of Section 2 of the Act to Regulate Commerce.

VII.

That it states that the tariffs lawfully on file with the Interstate Commerce Commission will show whether or not the facts alleged in paragraph VII of the complaint are true or otherwise,
81 but denies that such tariffs are unduly preferential. It admits that there has been no through and joint rates published and established by the other defendants to points on the line of this defendant, and states that it has requested the Chicago, Burlington & Quincy Railroad Company, one of the defendants, to publish and establish such joint rates, and to agree with this defendant on a just, fair and proper division of such joint rates between it and this defendant, but this defendant denies that any rates charged by it have been in violation of law, and especially in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce, as charged in said complaint.

VIII.

It denies the allegations contained in paragraph VIII of the complaint.

IX.

Further answering this defendant denies each and every allegation in said complaint contained, not hereinbefore admitted, denied, or otherwise answered unto, and specifically denies that the complainants, or either of them, are entitled to any reparation on shipments heretofore made, asked for in said petition.

Wherefore, having fully answered the complaint, this defendant prays that it be dismissed.

WYOMING RAILWAY COMPANY,
(Signed) By ALDEN, LATHAM & YOUNG,
Its Attorneys.

1104 Corn Ex. Bank Bldg.,
Chicago, Illinois.

Dated, Chicago, Ill., September 10, 1920.

82 We hereby certify that we have served a copy of the above and foregoing answer upon the complainants by depositing the same in the United States mail, postage prepard, addressed to Mr. R. S. Brown, 308 Columbia Building, Spokane, Washington, and have also mailed a copy to the attorneys for the other defendants, as follows:

John F. Finerty, Asst. Genl. Counsel, U. S. Railroad Administration, Hurley-Wright Bldg., Washington, D. C.

T. J. Dorety and R. J. Hagman, Attorneys for Great Northern Railway Co., 1120 Great Northern Bldg., St. Paul, Minn.

James B. Kerr and C. A. Hart, Attorneys for Spokane, Portland & Seattle Ry. Co., and Oregon Trunk Railway Co., 1410 Yeon Bldg., Portland, Oregon.

D. F. Lyons and B. W. Scandrett, Attorneys for Northern Pacific Railway Co., St. Paul, Minn.

O. W. Dynes and J. N. Davis, Attorneys for Chicago, Milwaukee & St. Paul Ry. Co., 1335 Railway Exchange Bldg., Chicago, Ill.

Kenneth F. Burgess, Genl. Atty., Chicago, Burlington & Quincy Railroad Co., 547 W. Jackson Blvd., Chicago, Ill.

on this 10th day of September, 1920.

(Signed) ALDEN, LATHAM & YOUNG.

1104 Corn Exchange Bank Bldg.,
Chicago, Illinois.

83 Before the Interstate Commerce Commission.

Docket 11608.

PIONEER LUMBER COMPANY, BUFFALO LUMBER COMPANY, Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, and Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee & St. Paul Railway Company, The Great Northern Railway Company, Northern Pacific Railway Company, Oregon Trunk Railway Company, Spokane, Portland & Seattle Railroad Company, Wyoming Railway Company, Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

George G. Belt, being duly sworn, deposes and says that he is a resident of Cedar Rapids, Iowa, and is General Manager of the defendant the Wyoming Railway Company, a Wyoming corporation, which owns and operates a line of road connecting with the defendant the Chicago, Burlington & Quincy Railroad Company at the town of Clearmont and extending up Clear Creek Valley to the town of Buffalo, a distance of about twenty-nine miles; that the general

offices of the Wyoming Railway Company are at Cedar Rapids, Iowa; that the company also maintains an office at Buffalo, Wyoming, and that as General Manager about two-thirds of his time is de-
84 voted to the business of the company at Buffalo, Wyoming, and that the remaining portion of his time, or approximately one-third, he spends at Cedar Rapids.

Affiant further says that as General Manager of the Wyoming Railway Company, in the regular course of business, he would receive any and all communications that were received from the Interstate Commerce Commission in regard to any proceedings or suits that are pending before the Commission to which the Wyoming Railway Company is a party; that such mail would come to this affiant if received either at the office of the company in Cedar Rapids or Buffalo.

Affiant further says that one R. Stewart Knapp, 1100 F Street, N. W., Washington, D. C., is the authorized agent of the Wyoming Railway Company to accept service, file tariffs, etc., in all proceedings before the Interstate Commerce Commission, and was such agent on the 16th day of July, 1920, and since that time; that he has been advised that a copy of the complaint in the above cause was served upon said Knapp by the Commission on the 16th day of July, 1920, and, as this affiant is informed, said Knapp, within twenty-four hours after the receipt of same, mailed the complaint to the Wyoming Railway Company at Cedar Rapids, Iowa, but this affiant states that the same was never received by the Wyoming Railway Company at Cedar Rapids; that while this affiant was in Buffalo, Wyoming, a week or more on and after July 16, said complaint, if it had been received, would have been forwarded to this affiant at Buffalo, or submitted to Mr. Isaac B. Smith, the Treasurer of
85 the company. This affiant has made diligent inquiry of his office at Cedar Rapids, Iowa, and does not find that any such document was ever received, and that this affiant did not know of the existence of this proceeding before the Interstate Commerce Commission until on or about the 20th day of August, 1920, and that this affiant and other officers of the company learned of the existence of said proceeding through one of the other railroads which is a defendant to the proceeding.

Affiant therefore states that in his opinion the copy of the complaint mailed to the said Wyoming Railway Company about the 16th of July, 1920, must have been lost in the mails.

Affiant further says that as soon as the Wyoming Railway Company learned of the existence of said proceeding they at once secured a copy of the complaint from one of the other defendants and have since said time been thoroughly investigating and preparing for the defense of said proceeding.

This affiant is now informed and advised that the time for filing an answer on behalf of the Wyoming Railway Company to the petition expired on the 15th day of August. This affiant therefore asks on behalf of the Wyoming Railway Company that leave be given the said Railway Company to file herewith instanter its formal answer

to the said complaint, and that it be permitted to offer evidence before the examiner in support of its said answer.

(Signed) GEORGE G. BELT.

Subscribed and sworn to before me this 9th day of September, A. D. 1920.

(Signed) HERTHA EBERT,
[SEAL.] *Notary Public.*

85½ Before the Interstate Commerce Commission.

Docket No. 11608.

PIONEER LUMBER COMPANY, BUFFALO LUMBER COMPANY, Complainants,

vs.

JOHN BARTON PAYNE, Director General of Railroads, as Agent, and Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee & St. Paul Railway Company, The Great Northern Railway Company, Northern Pacific Railway Company, Oregon Trunk Railway Company, Spokane, Portland & Seattle Railroad Company, Wyoming Railway Company, Defendants.

Answer of Spokane, Portland and Seattle Railway Company and Oregon Trunk Railway.

Filed Aug. 9, 1920. Interstate Commerce Commission. E. H.

The Spokane, Portland and Seattle Railway Company and Oregon Trunk Railway answer the petition herein as follows:

The defendants exacted and collected for the shipments described in the petition the rates applicable under existing tariffs, and these defendants deny that under said tariffs complainants have been or are being subjected to the payment of any charges in violation of any section of the Act to Regulate Commerce.

Wherefore these defendants pray that the complaint herein may be dismissed.

(S.) JAMES B. KERR,
(S.) C. A. HART,
Attorneys for Defendants Spokane, Portland and Seattle Railway Company and Oregon Trunk Railway.

86 Before the Interstate Commerce Commission.

Docket No. 11608.

PIONEER LUMBER COMPANY et al., Complainants,

vs.

DIRECTOR GENERAL, as Agent; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al., Defendants.

Spokane, Washington,
September 16, 1920—3.20 o'clock p. m.

Before F. W. McM. Woodrow, Examiner.

Met pursuant to notice.

Appearances:

J. B. Campbell and R. S. Brown, Realty Building, Spokane, Washington, appearing for Complainants.

R. J. Hagman, 1120 Great Northern Railway Building, St. Paul, Minnesota, appearing for all defendants except Wyoming Railway Company.

Burt Griggs, Buffalo, Wyoming, appearing for Wyoming Railway Company, Defendant.

87 *Index of Witnesses.*

R. S. Brown 7, 101, 175
P. M. Backus 59
L. I. Heilman 90
C. N. Bolander 105
L. R. Capron 131
G. A. Hoffelder 136
J. S. Reid 145
George E. Belt 148

Index of Exhibits.

Complainant's	No. 1, (Witness Brown)	10
	No. 2, " "	11
	No. 3, " "	15
	No. 4, " "	21
	No. 5, " "	23
	No. 6, " "	24
	No. 7, " "	25
	No. 8, " "	178
	No. 9, (Witness Belt)	170
Defendants'	No. 1, (Witness Bolander)	111
	No. 2, " "	113
	No. 3, (Witness Hoffelder)	137
	No. 4, (Witness Reid)	146
	Nos. 5, 6, " "	147
	No. 7, (Witness Belt)	154

88

Defendants' No. 8, (Witness Belt) 154

Sessions.

September 16, 1920 1-57
September 17, 1920 58-185

89 *Proceedings.*

Exam. Woodrow: We also have set for hearing today, Docket No. 11608, Pioneer Lumber Company, et al., versus Director General, as Agent, Chicago, Burlington & Quincy Railroad Company et al. Who appears for Complainants?

Mr. Campbell: The same appearances, Mr. Campbell and Mr. Brown.

Exam. Woodrow: And the Defendants?

Mr. Hagman: R. J. Hagman appears for all defendants except Defendant Wyoming Railway Company.

Mr. Griggs: Burt Griggs appearing for Wyoming Railway Company.

Exam. Woodrow: It is alleged that the rates charged since June 25, 1918, for the transportation of brick, lumber, shingles and posts from Sheridan, Wyoming, National and Eatonville, Washington, and Libby, Montana, to Buffalo and Ucross, Wyoming, which rates were constructed pursuant to the provisions of General Order No. 28 by increasing each factor of the combination rates in effect on this traffic theretofore, were and are unreasonable, unjustly discriminatory, unduly prejudicial to complainant and unduly preferential of complainant's competitors located on the Chicago, Burlington & Quincy Railroad, in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce and Section 10 of the Federal Control Act.

The Commission is asked to prescribe just and reasonable
90 through interstate rates on this traffic for the future and to award reparation.

Does that set forth the issues, gentlemen?

Mr. Campbell: Yes.

Mr. Hagman: I think I may be able to save some time by asking Mr. Campbell a few questions about the issues. You are of course not asking this Commission to establish joint rates for the future on brick originating in Wyoming? That would be strictly intrastate movement.

Mr. Campbell: That is probably true as far as that fact is concerned—rates on strictly intrastate.

Exam. Woodrow: Just what is your position, sir?

Mr. Campbell: Well, for the future on traffic moving entirely intrastate we probably could not ask the Commission to establish those rates, but of course any establishments on rates of the interstate would probably create a discrimination unless the intrastate rates were adjusted at the same time. This being however an action against the Director General of Railroads, those rates as far as reparation is concerned, are in question.

Mr. Hagman: How could there be any discrimination between the interstate rates involving lumber and shingles and the intrastate rates involving brick?

Mr. Campbell: I understand this involves brick interstate as well.

Mr. Hagman: I don't so understand.

91 Mr. Brown: No, it does not.

Mr. Campbell: But the question of reparation, however, would be one that it is proper to consider—reparation on these movements during Federal Control. But the fixing of the rate for the future, I presume, could not be passed upon by this Commission at this time under the law, as I understand it.

Exam. Woodrow: Then your prayer is for rates for the future on all interstate traffic?

Mr. Campbell: Interstate traffic.

Exam. Woodrow: From the points involved in this complaint?

Mr. Campbell: Yes, sir.

Mr. Hagman: By all interstate traffic, you mean lumber, shingles and posts?

Mr. Campbell: Whatever is involved in this action, I have not checked it to know. If those are the only ones involved, that would be all there could be involved.

Exam. Woodrow: Would it take you long to check them up?

Mr. Brown: Brick is the only intrastate movement. They are all interstate except those brick shipments.

Exam. Woodrow: Then Mr. Hagman was right. The issues are for rates for the future on Brick, lumber and shingles.

Mr. Hagman: Not brick, Mr. Examiner. Brick is the intrastate.

Exam. Woodrow: On lumber and shingles.

Mr. Hagman: And posts.

92 Exam. Woodrow: Any other questions?

Mr. Hagman: No, sir.

Exam. Woodrow: You may proceed, Mr. Campbell.
Mr. Campbell: Call Mr. Brown.

R. S. BROWN was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Campbell:

Q. State your name and business for the record.
A. Mr. R. S. Brown, Traffic Manager, Western Retail Lumbermen's Association, Spokane, Washington.
Q. What has been your traffic experience?
A. I have been railroading sixteen years; and a year and a half in the traffic Department of the Association.
Q. Have you got a statement there of the cars and the amount involved in this matter?
A. They all appear on the complaint, statement attached to the complaint, as an exhibit, showing the cars involved.
Q. Now, then, if the Examiner wishes, I presume we had better call other witnesses and prove the payment.

By Mr. Campbell:

Q. That Exhibit shows, does it, the rates?
A. Shows rates, charges, the charges collected, yes, sir.
Q. We will follow this by showing who paid these charges, unless the Examiner wishes that testimony to go in now.

93 By Mr. Hagman:

Q. Well, Mr. Campbell, how do we know the amount paid?
Mr. Campbell: I understand the Exhibit shows the amount paid.
Mr. Hagman: I know, but the Exhibit shows there is discrimination too, but we are not going to take the complaint for it.
Mr. Campbell: That Exhibit shows the amount paid and the cars upon which it was paid.
Mr. Hagman: Yes, but you are going to have the expense bills?
Mr. Campbell: Oh, yes, we have expense bills.
The Witness: Yes, sir.
Mr. Campbell: We are not asking this to take the place of the expense bills. The Examiner, I understood, wanted the testimony as to the cars and the payment first.

By Exam. Woodrow:

Q. This exhibit shows the route of movement in each case, does it?
A. Yes, sir.

Exam. Woodrow: There appear to be so many shipments the Examiner will not request the Expense bills, but they can be furnished

in accordance with Rule 5 of the Rules of Practice. However, you can prove your right to receive reparation.

Mr. Campbell: We will do that by another witness.

94 By Mr. Campbell:

Q. Proceed, Mr. Brown.

A. There are two separate charges of unreasonableness here, one of them due to the method in which the carriers complied with Order 28 in combination rates, and the other one due to failure of carriers interested to establish through rates in blanket rate territory on lumber originating at Coast and Spokane points. Of those I will take up the combination rate first.

The 65th Congress enacted the Federal Control law, in which the President was empowered to take possession and assume control of any and all systems of transportation, and provide for the operation of such transportation systems while under Federal Control for the just compensation to their owners and for other purposes.

Section 10 of this Act provided that during the period of Federal Control the President may initiate rates, fares, charges, classification regulations and practices by filing claim with the Interstate Commerce Commission, but that such rates, fares and so forth, shall be just and reasonable.

The President issued his proclamation assuming control of each and every system of transportation located within the boundaries of the United States, and provided that possession during the operation of such transportation systems be exercised through William G. McAdoo.

This proclamation provided that orders, general or special, made by the Director General, shall have paramount authority and
95 be obeyed as such.

The Director General first issued Order 28 increasing freight rates, effective June 25, 1918. This order provided that lumber and articles taking lumber rates be increased 25 per cent, but not exceeding an increase of 5 cents per 100 pounds, and that brick be increased 2 cents per cwt.

This Order resulted in some confusion, carriers placing a different interpretation upon its terms. Consequently Edward Chambers, Director of Traffic, issued effective July 2, 1918, his Freight Rate Authority No. 10. I would like to file a copy of Freight Rate Authority 10 as Exhibit No. 1.

(Copy of Freight Rate Authority No. 10 was received in evidence, thereupon marked "Complainant's Exhibit No. 1, Witness Brown," and is forwarded herewith.)

The Witness: Freight Rate Authority No. 10 is dated July 2, 1918, and states that under date of June 8, 1918, carriers were instructed that where increases were made to combinations of rates, the increase should be made to through continuous movement, and not to each unit of the movement.

By Mr. Campbell:

Q. You may state whether or not this was done, or how these rates were made up.

A. Due to the failure on the part of the carriers to comply with instructions in Freight Rate Authority 10 each unit of the through rate, of the factors making up the through rate on the traffic,
96 as shown on the Exhibit attached to the complaint, was increased, resulting in an unreasonable increase. I would like to file a statement.

Exam. Woodrow: It will be received and designated as Complainants' Exhibit No. 2.

(The statement was received in evidence, thereupon marked "Complainants' Exhibit No. 2, Witness Brown," and is forwarded herewith.)

The Witness: This is a statement showing rates, revenue per ton mile, and percentage of increase since June 24, 1918. The points of origin here are points taken from actual movement, as shown on our bill of complaint.

The rate in effect on June 25, 1918, for example, from National, Washington to Buffalo, was 65 cents per 100 pounds. That rate is made up of two factors, 45 cents from National to Clearmont, and 20 cents from Clearmont to Buffalo.

The manner in which the carriers complied with Order 28 in this instance, resulted in an increase in rate of 16 per cent.

The revenue per ton mile from this particular shipment under a 65 cent rate was $.0102 per ton mile.

Now, the rate in effect on June 24th from this same point to Buffalo was 56 cents per 100 pounds. The factors of that rate were 40 and 16. The 40 cent rate was increased 5 cents per 100 pounds, and the 16 cent rate was increased 25 per cent, making a double increase to the rate in effect June 25th.

97 Exam. Woodrow: Is it your contention that the whole rate should have been increased 5 cents per 100 pounds?

A. Five cents, yes, sir. I have shown here for the Examiner's information, the rate in effect at the present time, due to the increase in Ex parte 74. That 81½ cent rate is made up of two factors: It would be 25 cents for the Wyoming Railway and 56½ cents to the transcontinental lines. In that instance we are asking for an establishment of the through rate, which I will take up later, of 56½ cents.

Q. Just at this point, what is the through rate you desire, or that you deem reasonable?

A. 56½ cents, applying from National to Buffalo.

Q. Applying from Buffalo to National, is that it?

A. No, from National, point of origination, 56½ cents. That is prior to the 28 Order.

Q. As the Examiner understands it, there was a rate prior to June 24th of 56 cents?

A. Yes.

Q. Now, notwithstanding the 25 per cent increase of the Director General and the increase in Ex parte 74, you request the Commission for a rate of 56½ cents as a reasonable rate, is that correct?

A. No, we are requesting a reasonable rate be established under the basis of rates in effect June 25th, plus the increase in Ex parte 74 of that reasonable rate.

98 Q. Now, could you state just what it is in cents, so that there will be no confusion?

A. That would be 61 cents.

By Mr. Campbell:

Q. Aren't you mistake in that, Mr. Brown? That is, upon this feature of the case, if the reparation should be that amount, you are asking for that rate; but for a future rate you are asking for a rate still lower than that, are you not?

A. Yes, for the future I am asking for the establishment of a rate that now applies to Clearmont, the junction, in other words, the blanket rate which applies to Clearmont, into Buffalo.

By Exam. Woodrow:

Q. You see the Examiner's difficulty, Mr. Brown.

A. I have another statement which will explain the blanket rates in effect. This deals just with the reparation that we are asking, due to the combination feature—Order 28.

Q. The Examiner would like for the record, your position as to the rate that you deem reasonable, and that you request the Commission to establish for the future.

A. The record will show that in another statement I have.

Q. You will pardon the Examiner, then, for interrupting. He will refrain and permit you to develop the matter in your own way.

A. I have a statement that will show that thing very clearly.

99 Mr. Hagman: To remove confusion in my mind, I would like to know what he meant by that 56½ cent rate he said he wanted.

Mr. Campbell: I think we can clear that up now. There are two requests we have: One is for reparation during the time of this movement under Federal Control. Now, the basis of reparation is the difference between what the rates were actually increased to and what they should have been increased to if our contention is right that they should have had but one increase instead of two. Then on the next feature of the case we ask for the establishment of a joint through rate. We ask that that joint through rate be the Clearmont rate, which is in blanket territory, and that is a lower rate than we are asking be used for reparation purposes. Is that right?

The Witness: Yes.

Mr. Hagman: But what is the 56½ cent figure referred to?

A. That represents the rate in effect from National to Clearmont,

the junction point on August 25th, prior to the increase in Ex parte 74.

Q. That is not a joint through rate from National to Buffalo?

A. Not by any means. We are asking for the establishment of the Clearmont rate to Buffalo.

By Exam. Woodrow:

Q. You mean on June 25th?

A. No, 45 cents. I am asking the rate to Clearmont, Wyoming, that is the junction point. Probably if I follow the map you will understand a little more clearly the situation. So I will put
100 this in as an exhibit now.

Mr. Campbell: That will be Exhibit No. 3.

(The statement was received in evidence, thereupon marked "Complainants' Exhibit No. 3, Witness Brown," and is forwarded herewith.)

The Witness: I have shown here, Mr. Examiner, on this statement, a rate in effect on June 25th of 65 cents on fir lumber from National, Washington, to Buffalo, Wyoming. This is the top item in the statement. That rate is made up of two factors, a through rate carried in Transcontinental Tariff 1003, I believe is the number, to Clearmont, Wyoming, the junction point—Clearmont on the C. B. & Q. —and from Clearmont to Buffalo, the rate in effect at that time was 20 cents. Those are the two factors making the 65 cent rate.

Now, to Ucross, the top shipment on the statement, from Eatonville, Washington, car of fir lumber, the rate in effect on June 25th as the result of Order 28, 54 cents. That is made up of two factors: 45 cents from Eatonville to Clearmont and 9 cents from Clearmont to Ucross.

It will be noticed that the revenue in one instance per ton mile is a fraction over a cent; to Ucross it is $.087, while during 1918 the Statistics of Common Carriers, as compiled by the Interstate Commerce Commission on all revenue freight showed the Burlington as earning $.00738; the Milwaukee $.00840; the Great North-
101 ern $.00870 and the Northern Pacific $.00819 per ton mile.

By Exam. Woodrow:

Q. What is that average?

A. Average revenue per ton mile shown by the Bureau of Railway Statistics——

Q. Well, do you lay much stress on those figures? Do you think they can prove your case?

A. No, I think this will show a reasonable comparison—show by comparison that these rates were unreasonable on traffic moving at the same time.

Q. Do you know any reason why lumber and these commodities should not bear more than the average cost?

A. Lumber is considered a low-grade of traffic. The risk of transportation is not great, and I do not think it is reasonable to earn average revenue.

By Mr. Campbell:

Q. And where the Commission has fixed the rate on lumber they have fixed it lower than other commodities taking the same general class, have they not?

A. Yes, sir. That is all I have to say on the combination rate feature of the complaint.

Mr. Hagman: Right there, if that is all you have to say, I would like to know what you want, what you are asking for.

Mr. Campbell: That will appear as the testimony goes on.

Mr. Hagman: I understand the reparation, what you want to reparation, but I am speaking of the future.

102 The Witness: I will explain when I get into it.

Mr. Campbell: I would like to modify a little the statement made there. I think if reparation is granted, and the Commission should find that 56½ cents is a reasonable rate for the future, I think reparation ought to be to that amount; but if and only in case that they do not find that that is the reasonable rate for the future, that the reparation should be confined to the difference between the one advance and the two advances, and that is the contention which we make here. If they should find that the rate for the future should be 56½ cents, then reparation should be for the difference between what was paid and 56½ cents; but if they should find that the rate for the future should not be that, then the measure of reparation should be the difference between the increase in the two factors or the one.

By Exam. Woodrow:

Q. Gentleman, the Examiner does not understand this, and he is going to ask a few questions. From your Exhibit 2, or in your exhibit, you show that the rate from National, Washington, to Buffalo, prior to June 25, 1918, was 56 cents?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Then there was an increase in pursuance with General Order No. 28; one factor was increased from 40 cents to 45 cents,

103 or an increase of 5 cents, and the other factor was increased how much?

A. From 16 to 20, an increase of 4 cents.

Mr. Campbell: 25 per cent.

By Exam. Woodrow:

Q. An increase of 4 cents, making the rate 65 cents?

A. Yes, sir.

Q. Now, in pursuance of Ex parte 74 the present rate is 81½ cents?

A. Yes, sir.

Q. Notwithstanding the fact that the present rate is 81½ cents is it your position that the reasonable rate for this movement should be 56½ cents?

A. Yes, sir.

Q. And that is the rate from National, Washington, to Buffalo, Wyoming that you desire the Commission to establish for the future?

A. That is the rate from National to Clearmont, Wyoming, the junction point with the Burlington. We ask that the rate be established to Buffalo.

Q. Leave Clearmont out of it. You desire the rate from National, Washington, to Buffalo, Wyoming, to be 56½ cents, which you claim should be the reasonable rate to Clearmont, Wyoming—put it that way.

A. Which is the present rate to Clearmont and which we
104 claim would be a reasonable rate to Buffalo,—the extension of that rate through to Buffalo.

Mr. Hagman: Under Ex parte 74, Mr. Examiner, the rate from Clearmont has been increased to 56½ cents, and they wish to have that rate to Clearmont made the rate to Buffalo.

By Exam. Woodrow:

Q. This exhibit does not show that, and that is what the Examiner wanted to bring out.

A. I have another exhibit that does show that. I am just confining this exhibit to the combination feature, showing the increase that resulted from the Order 28 due to the increase of both factors of the rate in effect prior to June 24, then the increase due to Ex parte 74, and that is all this statement is intended to show.

Mr. Campbell: The testimony will clear it up as we go along.

The Witness: My other statement will clearly show you what we are after.

Exam. Woodrow: The Examiner will refrain from asking questions, then, and he apologizes for the interruption.

Mr. Campbell: We have no objection, Mr. Examiner.

Exam. Woodrow: Proceed.

The Witness (Mr. Brown): By referring to the blueprint, we have shown the transcontinental carriers, the Great Northern and Northern Pacific operating say from Seattle to Laurel and Billings, Billings being the gateway in connection with the C. B. & Q. and Northern Pacific, and Laurel the Great Northern gateway.

105 For a long period of time it has been the practice of carriers in this vicinity to blanket rates on lumber. They have applied the blanket scale of rates to various branch line points. As shown by the map they apply at Spearfish and Deadwood, on a branch of the C. B. & Q., at the present time the same rate as applies to Clearmont, Wyoming, and down on the other branch of the

Burlington as far as Birds, Colorado, a point on the Great Western Railroad, they also apply the same rate as applies to Clearmont.

By Mr. Campbell:

Q. Now how many lines, Mr. Brown, does the traffic move over to reach Deadwood and Spearfish?

A. Well, those are terminal points on the Spearfish and Deadwood branch of the C. B. & Q., and it would move over the Great Northern or the C. B. & Q. or Northern Pacific and C. B. & Q. To get to Birds you must move over these same lines also, over the Northern Pacific or Great Northern and the Burlington, Colorado & Southern and the Great Western, or four railroads. As I said before, it is common practice to blanket rates and extend them onto small lines.

In this blanket rate territory, for instance, groups A, B and C rates from Coast points apply to points on the Colorado & Southern, a switching road of 20 miles total trackage. The rates also apply to Casper, Wyoming, via the northern route, the Northern Pacific or Great Northern through the junctions shown on the map, via
106 the C. B. & Q. direct, or via the C. B. & Q., Powder River and the C. & N. W.

Q. Casper is not shown on that map?
A. No, it is not shown?
Q. Where is that?
A. It is directly south of Buffalo.
Q. Directly south of Buffalo?
A. Yes.
Q. On what line?
A. On either the C. B. & Q. or the North Western.

By Exam. Woodrow:

Q. How many miles south of Buffalo is Casper?
A. I think it is 60 or 70 miles.

Mr. Hagman: 135.
The Witness: You meant in rough line?
Exam. Woodrow: Well, the map will show that?
A. Yes, sir. I wish to file at this time this Exhibit.

(The statement was thereupon received in evidence, marked "Complainants' Exhibit No. 4, Witness Brown," and is forwarded herewith.)

The Witness: This is a statement showing rates to Buffalo, Wyoming, from representative points of origin, compared with rates to other destinations in blanket rate territory.

By Mr. Campbell:

Q. Does this exhibit show for itself, or have you any explanation of it?

107 A. Well, it shows for itself, although I would like to explain the revenue per ton mile.

Q. Yes, explain anything you deem necessary.

A. For instance, I will deal with the rates in effect June 25th to Buffalo: the rate in effect June 25th was 65 cents from National, Washington, on fir lumber, and that returned a revenue of a fraction over 1 cent per ton mile. The distance from National to Buffalo is 1,270 miles.

At the same time carriers had in effect a rate of 45 cents on fir lumber from National to Spearfish, South Dakota. That returned them a revenue of $.0057 per ton mile. In order to take that traffic from National to Spearfish it was necessary to haul through Clearmont, a 45 cent rate applying also at Clearmont at that time.

By Exam. Woodrow:

Q. Do you allege violation of the Fourth Section?

A. No, sir.

By Mr. Campbell:

Q. Right there, though, you do allege violation of Section 2, the service up to Clearmont being contemporaneous, is it not?

A. Yes.

Mr. Campbell: Allegation of violation of Section 2 is not necessary because it is not over the same route to Buffalo, so far as Buffalo is concerned.

The Witness: Carriers extended the rate of 45 cents to
108 Birds, Colorado, a distance of 1676 miles from National. That Birds rate is extended over at Loveland, over the Great Western Railway, a short line.

I call the Examiner's attention to the important statement of average per ton mile earnings shown in Common Carriers Statistics Report for 1918, for comparison with the earnings shown there.

I would like to offer at this time, statement showing rates and ton mile revenue accuring to the Wyoming Railway Company and transcontinental carriers on lumber from representative points.

Exam. Woodrow: It will be received.

(The statement was reecived in evidence, thereupon marked "Complainants' Exhibit No. 5, Witness Brown," and is forwarded herewith.)

The Witness: The purpose of this statement is simply ton mile revenue which accrues to the transcontinental carriers up to Clearmont, and the ton mile revenue accruing to the Wyoming Railway Company under rates in effect on June 24th, June 25th and present rate.

By Mr. Campbell:

Q. That shows for itself?

A. Yes, sir.

Q. Exhibit 6.
A. Exhibit 6 is a statement showing revenue per ton mile accruing to the carriers if through rates were established to
109 Buffalo, Wyoming, compared with revenue accruing from rates to Birds, Colorado, which are already established through rates.

By Exam. Woodrow:

Q. Just a minute. If through rates should be established to Buffalo the same as to Clearmont?
A. That is it, that is our contention.
Q. In other words, Exhibit 6 shows the rates from points of origin to Clearmont, and it is complainant's contention that those rates ought to be applicable to Buffalo, is that your contention?
A. That is the contention, yes, sir.

(The statement was received in evidence, thereupon marked "Complainants' Exhibit No. 6, Witness Brown," and is forwarded herewith.)

The Witness: The rate in effect June 25th from National—just a minute. That statement should show Clearmont instead of Buffalo, Wyoming.

By Mr. Campbell:

Q. Well, if this rate was extended to Buffalo it would show—your exhibit shows per ton mile earnings——
A. If they were, yes, that is the idea. I will deal with the rate on June 25th first. If the rate had been extended to Buffalo it would have been 45 cents, or in other words, the Clearmont rate applied to Buffalo. This is a distance of 1,270 miles, with ton
110 mile earning of $.007. At the same time carriers had in effect a 45 cent rate from National to Birds, Colorado, a distance of 1,676 miles, which returned them a ton mile earning of $.0053.

By Exam. Woodrow:

Q. You are speaking now of the rate from National to Clearmont?
A. If it was extended to Buffalo—if through rates were established to Buffalo, that would be the ton mile earning.

By Mr. Campbell:

Q. The mileage shown is the mileage to Buffalo?
A. Yes, sir.

Mr. Campbell: I offer Exhibit 7.
Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked, "Complainants' Exhibit No. 7, Witness Brown," and is forwarded herewith.)

The Witness: This is a comparative statement of car mile earnings. I have shown here the rates from four different points on four different grades of forest products.

Proposed rate, that is, the rate we propose would be the reasonable rate, to Buffalo, Wyoming, 56½ cents.

Also I have shown the present rate there. Under the present rate the car mile earnings would be 46.06 cents; under proposed rate, 31.93 cents. Now to get those car mile earnings, I have used, as shown there, on fir lumber, 63,760 pounds; on cedar lumber, 46,980 pounds, and on shingles, 34,666.

111 Those bases of the average car loading were the bases that were submitted to the Commission in Ex parte 74 by the West Coast Lumbermen's Association, Seattle. The basis for pine is my own estimate. I could not get any authentic average loading for pine.

At the same time from Everett, for instance, to Clearmont, Wyoming, a distance of 1099 miles, the rate is 56½ cents, and that returns a car mile earning of $32.77, or in other words it is 84 cents per car mile earnings less than to Clearmont. To Birds, Colorado, at the same time they carried 56½ cent rate, 1,679 miles, and their return per car mile is $21.45. That is $10.48 per car mile earning less than our proposed rate to Buffalo would return to the carrier, and $24.61 per car mile earning less than under the present rate to Buffalo.

By Mr. Hagman:

Q. Let me ask you there whether you mean per car mile or per car?

A. Per car.

Q. Your heading says "per mile."

A. Per car earning.

Mr. Campbell: I do not see how that could be—you have that per car mile—unless that is 32 cents instead of dollars.

By Exam. Woodrow:

Q. Have you decided what it is, sir?

A. Per car mile.

Mr. Campbell: And it will be 32 cents instead of 32 dollars.

Exam. Woodrow: Those are cents, in Exhibit No. 7, in-

112 stead of dollars.

Mr. Campbell: Must be.

The Witness: Yes. That is all the exhibits I have to explain the rate situation.

I would like to offer in evidence reference to this Pine Plume Lumber Company decision, with the permission of the Examiner.

By Mr. Campbell:

Q. Make the reference, as you did in the other case.

A. In Docket No. 10933, Pine Plume Lumber Company, versus Director General, Atlantic Coast Line Railroad and others. I call the Examiner's attention to proposed report of Attorney-Examiner M. A. Pattison, where similar question of combination rates was under consideration.

Mr. Hagman: Is this argument or evidence?

Mr. Campbell: It is evidence.

Exam. Woodrow: It is in; it doesn't make any difference what it is.

By Mr. Campbell:

Q. Is that all the exhibits you have?

A. Yes, sir.

Q. Now, Mr. Brown, will you explain the blanket territory in which Buffalo is situated, or is that a blanket territory, known as blanket territory, in which Buffalo is situated?

A. It is.

113 Q. Are there any points in and about Buffalo on branch lines that do not have joint rates in the Clearmont list that you know of?

A. Not that I know of. All lines in the vicinity of Buffalo, points on the C. B. & Q., they all enjoy the blanket rate.

Q. The movement to Spearfish and Deadwood is over at least two lines, while to Birds it would require at least four lines to move over, and at Buffalo it could move over but two lines?

A. That is it—well, depending on where it originated. To Buffalo it would be three lines, Northern Pacific, C. B. & Q. and any other line.

Q. It would have to originate on the Great Northern some place in order to be three lines?

A. Yes.

Q. Anything else that you have to state?

Exam. Woodrow: Does the Examiner understand, then, that shipments destined to Clearmont, Spearfish, Deadwood and Edgemont, from points of origin take the same rate?

Mr. Campbell: Take the Clearmont rate. They do now.

The Witness: As applied to Clearmont, yes, sir.

By Exam. Woodrow:

Q. From the points of origin involved in this case?

A. From the points of origin, yes, sir.

Q. And that Buffalo takes a higher rate because Buffalo is on an independent line?

114 A. I might state at this time that the independent line has requested of the Burlington that they establish through rates.

By Mr. Campbell:

Q. That is shown by their answer?
A. That is shown by their answer to our complaint,—which has been denied.

By Exam. Woodrow:

Q. Then that is the issue in this case entirely?
A. That is the issue, yes, sir.
Q. To have the Clearmont rate established to Buffalo and to Ucross, is it?
A. Ucross, yes, sir, that is an intermediate point. That is the same rate that applies to Colorado, to Birds, Colorado, on a short line railroad, the Great Western Railway—a distance of 1,679 miles from Everett, for instance.
Q. Well, Birds does not take the same rate as Clearmont?
A. Yes, sir.
Q. Well, do Wendover and Loveland take the same rate as Birds and Clearmont?
A. Yes, sir.
Q. From all the points of origin involved in this complaint?
A. Yes, sir, as shown by the Exhibit.

Exam. Woodrow: You may proceed.

By Mr. Campbell:

Q. Have you anything else, Mr. Brown?
A. I think not.

115 Cross-examination.

By Mr. Hagman:

Q. Mr. Brown, you testified as to General Order No. 28 and Freight Rate Authority No. 10. Did you mention the date that the tariff provided for the single increase, or the tariff that provided for a single increase?
A. Not in connection with the Wyoming railroad, no, sir. There was no provision in any tariff until Morris' Tariff was issued.
Q. This case, then, differs from the one we had this morning in that the tariff never did provide for a single increase, even after your shipments moved?
A. No, sir, never did provide, that is, the tariffs never did. As far as concerns Morris' Tariff No. 228 is concerned, that applied to the transcontinental rate up to Clearmont. Of course that combination clause was not effective in connection with non-Federal Controlled carriers. That did not amend their local tariffs so as to become a party of record to the Morris' tariff.
Q. Are you going on the theory that the Wyoming Railway was under Federal Control or not under Federal Control?

A. The Wyoming Railway was under Federal Control at the time that all carriers were taken under Federal Control. At the time they took advantage of the 28 Order and increased their tariff, June 25th, 1918, they were under Federal Control, and they were relinquished from Federal Control June 29, 1918.

Q. Then you are basing your statement on the assumption
116 that they were not under Federal Control when your shipments moved, is that right?

A. No, it don't make any difference whether they were or not. My statements are based on rates that resulted.

Q. It seems to me it would make all the difference in the world.

A. I do not quite see how it would.

Q. If they were not under Federal Control you surely do not argue that General Order 28 applied to them?

Mr. Campbell: That is a matter of argument.

By Mr. Hagman:

Q. I am trying to get at how he bases his complaint, that is all.

A. The basis of my complaint is the unreasonableness of the rate that resulted from the double increase in the combination rates; also the establishment of through rates for the future.

Q. You are making the contention, as I understand, that General Order 28 itself called for only a single increase, is that right?

A. No, my statement I think was that Freight Rate Authority No. 10 was an interpretation of the Order 28, General Order No. 28, and in that Freight Rate Authority 10 a statement was made by Edward Chambers that the increase should be made to through continuous movement.

Mr. Campbell: And further we will argue that that General Order 28 contemplated but one increase, as is shown by the inter-
116½ pretation of that order in Freight Rate Authority No. 10.

By Mr. Hagman:

Q. That double increase in dollars and cents amounts to five cents here, doesn't it?

A. Four cents to Buffalo, and two to Ucross.

Exam. Woodrow: That is four cents in excess of what it would have been if there had only been a through movement and one increase?

Mr. Campbell: One increase of four cents, and by increasing it twice they made an extra four cents.

The Witness: One increase was five cents, the maximum. We contend one increase should apply to through movement. That is a maximum of five cents.

By Exam. Woodrow:

Q. As the Examiner understands you, there was a 9 cent increase?

A. That is it, five and four.

Q. Therefore, if there had been one increase, it would have been a maximum of five cents, and that the damage here is by the double increase?

A. That is it, that is, to Buffalo; to Ucross the two cents is the damage.

Q. That is the basis on which you desire reparation?

A. No.

Mr. Campbell: No, we desire reparation to 56½ cents providing the Commission finds that 56½ cents is the rate for the fu-
117 ture; but if they fail to find 56½ cents is the rate for the future, then we claim that is the basis for reparation in this movement.

Exam. Woodrow: Then you want to amend your complaint to that extent?

Mr. Campbell: No, we do not.

Mr. Hagman: I was going to make that point, Mr. Examiner, but I do not think the issues are broad enough. They complain simply of that interpretation of General Order No. 28.

Mr. Campbell: But that was filed prior to Exparte 74.

Mr. Hagman: Exparte No. 74 has nothing to do with the reparation.

Mr. Campbell: Yes it had to do with the measure now of the present rate and the rate for the future.

Mr. Hagman: It has to do with the rate for the future, but you want reparation on your complaint solely on the ground of the double increase. That is the way I understand the issues.

Exam. Woodrow: The Examiner understood the issue to be that you were satisfied with the rates charged, to the extent that they included only a single increase, and if they had included a single increase, then you would not have brought this complaint?

The Witness: No, sir, that is part of the complaint. Then we go on and say we ask the establishment of a through rate because of the unreasonable rates carried in tariffs named in the complaint.
117½ Exam. Woodrow: You desire the establishment of a reasonable rate for the future on the basis of the Clearmont rate, but you are limiting your request for reparation to the rate that would be reasonable in your opinion, if a single increase had been applied.

Mr. Campbell: I think that is right under the complaint. I am looking over these——

The Witness: It would have been all right if it had not been for Exparte 74 increasing the rates. I don't know whether the—if the Clearmont rate is established to Buffalo, wouldn't that be the basis for reparation?

Mr. Campbell: I think so. How that was brought out was this: this increase now by Exparte 74 increases it beyond the point of where reparation was asked for before, and in view of Exparte 74 I think the prayer perhaps should be amended, asking that reparation be granted to the extent found reasonable for the future, and if no rate is found reasonable for the future, then the difference should be as alleged now in the prayer, prayed for.

Mr. Hagman: I understood from the complaint, Mr. Examiner, that the issue as to reparation was this: they are asking reparation on basis of a single increase instead of a double increase, and that is all. Now, Exparte 74 cannot possibly enter into the reparation question.

118 Exam. Woodrow: That was the Examiner's understanding, as stated by the previous question. The Examiner would like to have it cleared up to show just what the complainant wants.

Mr. Campbell: I think that is technically true, as the complaint is drawn, but as has been explained, on account of Ex parte No. 74, it increases the rate. If it had not been for Ex parte 74 the increase in this rate to 56½ cents would have remained then, and just the difference on the reparation will be less than it would have been before Ex parte 74, because the rate is now greater.

Exam. Woodrow: You speak about the rate now as the Clearmont rate?

Mr. Campbell: Yes. That is the rate that we ask to be established for the future. Now, if that rate is established for the future, reparation should be the difference between that rate established for the future and the rate actually paid; but if that rate is not established for the future, then reparation should be paid only on the difference between the two increases. Isn't that right?

The Witness: That is right.

Mr. Hagman: In other words, you paid 58 cents from Spokane to Buffalo when these shipments actually moved?

Mr. Campbell: Yes.

Mr. Hagman: 38 to Clearmont and 20 cents beyond. And

119 now, you are saying that 56½ cents is a reasonable rate.

Mr. Campbell: Is a reasonable rate.

Mr. Hagman: Is a reasonable rate. And if the Commission finds that to be correct, you are asking for the difference between 58 cents and 56½ cents, instead of the double increase, the difference made by the double increase, is that correct?

Mr. Campbell: No, I think on these actual movements the difference would be in the increase, but for other movements it would be the two cents, but for these actual movements the difference would be between the double increase and the single increase, because this moved during Government Control. Any movement since Government control that would be true.

Exam. Woodrow: Does the Examiner understand, then, that the rates from point of origin to Buffalo, if there had been applied a single increase in accordance with complainant's contention, would have been lower than the present rates to Clearmont that you desire established for the future?

Mr. Campbell: Yes. But on this movement during Government control the measure of the reparation there is the difference between the increase; but since Government Control the measure then would be the difference between the rate to Buffalo and the 56½ cents which would be established for the future. Then that clears it up.

Exam. Woodrow: And there is no inconsistency in the
120 complaint?

Mr. Campbell: It does not seem so to me.

Exam. Woodrow: You may proceed with your cross examination.

Mr. Hagman: I don't think we ought to leave this before we clear it up. If Mr. Campbell will point out my error, I will be glad to understand this thing. Take the shipment from Spokane; you will agree with me that the rate up to Clearmont is 38 cents?

Mr. Campbell: I don't know what the rate was.

Mr. Hagman: Your rate man here will know.

Mr. Campbell: Take the National rate, rate from National, Washington.

Mr. Hagman: Let me take mine. I have got this all figured out. Mr. Brown, you can tell us whether 38 cents is correct?

A. You say from Spokane to Buffalo?

Q. No, to Clearmont.

A. 38 cents.

Q. Yes. Then it is 20 cents from Clearmont to Buffalo?

A. Yes, sir.

Q. Making the rate 58 cents at the time these shipments moved, after General Order No. 28?

A. Yes.

Q. That is right, isn't it?

A. Yes, sir.

Q. All right. Now, then, you are asking for the Clearmont rate to be extended to Buffalo, are you not?

121 A. Yes, sir.

Q. In other words, you are asking for 38 cents to Buffalo?

A. Yes, sir.

Q. Now, if you are asking for reparation on basis of future rate of 38 cents, you are going to get 20 cents reparation; if you are asking reparation on basis of the double increase, or a single increase you are going to get four cents.

Exam. Woodrow: But isn't he asking for the rate to Clearmont that is in effect now established in accordance with Ex parte No. 74? And what is that?

A. 56½ cents.

By Mr. Hagman:

Q. Well, what is it from Spokane?

A. From Spokane it is 60 cents.

Q. How much?

A. 60.

Q. It cannot be.

A. 47½.

Q. 47½ cents. That makes a difference of 10½ cents. So your reparation would be 10½ on that basis.

Mr. Campbell: For all shipments since the cessation of Federal Control, but during Federal Control it would be the difference between the two increases.

By Exam. Woodrow:

Q. What would be the difference between the two?
A. Four cents on Buffalo, two cents on Ucross.

122 Mr. Campbell: On the movement under Federal Control, and on movement since Federal Control we ask for the difference.

Exam. Woodrow: But for all the shipments involved in this proceeding, you seek reparation on basis of the difference between the rates paid and the rate that would have been paid provided one increase had been applicable, is that correct?

Mr. Campbell: That is right.

Mr. Hagman: For Federal-Controlled shipments.

Exam. Woodrow: For Federal-Controlled shipments, but those are the shipments in this proceeding.

Mr. Campbell: Well, yes, but yet we ask that the reparation be ordered on all shipments up to the time of the settlement in the prayer, so a different rule would be applied on those movements since Federal Control ceased.

Exam. Woodrow: But this case does not include those additional shipments, does it?

Mr. Campbell: No, they have not been made up, because I think at the time this complaint was brought it was still under Federal Control.

Exam. Woodrow: How do you intend to prove those additional shipments, in the event the Commission should award reparation?

Mr. Campbell: I expect the Commission will do as they usually do in cases where reparation is given—permit a chance to prove it.

123 Exam. Woodrow: On informal docket?

Mr. Campbell: Formal or informal either.

Exam. Woodrow: How do you justify your request, then, that the rates were unreasonable, and that a rate, a higher rate was a reasonable rate during Federal Control than at the present time?

Mr. Campbell: Well, I don't know that there was any difference, but we have not asked that the reparation be allowed down to the basis of reasonableness at that time, but only on account of this error in publication of tariff, and under interpretation by the orders.

Mr. Hagman: Your complaint does not split the thing up that way. There is only one issue there, and I want the record to show objection on behalf of the defendants to enlarging the issue as to any shipments whatever.

Mr. Campbell: Why yes, the complaint specifically prays for reparation on shipments up to the time of settlement, and that is all we have done.

Mr. Hagman: Yes, because of the double increase only.

Mr. Campbell: Oh, I think that is an assumption on your part.

Mr. Hagman: Read it.

Exam. Woodrow: What paragraph of the complaint do you refer to?

Mr. Hagman: Paragraph 9 of the complaint asks that
124 reparation be granted as shown in Exhibits A, B, C and D, et cetera, and that is figured on basis of a single increase instead of double.

Mr. Campbell: Also that they be ordered to pay complainants reparation on all other shipments——

Mr. Hagman: On the same basis.

Mr. Campbell: It doesn't say the same basis—between the date of this complaint and date of final settlement.

Exam. Woodrow: You may proceed with your cross examination. I think the record shows the position of both parties now.

Mr. Hagman: Now, before we leave this double increase feature, Mr. Brown, you in stating what you did with reference to General Order No. 28 and Freight Rate Authority 10, you simply stated your own personal opinion as to the proper construction of General Order No. 28 and that Rate Order, did you not?

Mr. Campbell: That is objected to as not proper cross examination. He did not do anything of the kind. He told what Rule 10 was, and it is in the record, and speaks for itself. That is a matter of argument, and, as I said before, we will argue that order 28.

Exam. Woodrow: I think the record shows that, and if you will dispense as much as possible with argument, the Examiner will appreciate it. You can ask the question if it was a matter of opinion.

I think the record shows that it was a matter of an expression
125 of his opinion.

Mr. Hagman: That is what I want to clear up. Before I can ask him any further questions I want to get my exhibits numbered correctly. I have got them wrong here.

By Mr. Hagman:

Q. Referring to your Exhibit No. 2, Mr. Brown, the rates on lumber and shingles from the Northwest to points in Wyoming were at the time these shipments moved, and still are blanketed at both ends, are they not?

A. Yes, sir, from all points of production.

Q. Now, will you state the limits, roughly, of the blanket on each end?

A. I think from the points of production, origination points, the Coast rate is applicable from all points west of the Cascades, and extending from northern Washington to lower Willamette Valley, in Oregon, and I think this 45 cent rate that we have been charged, that 45 cent rate that we have requested, that is the one that was in effect June 25th.

Q. You don't mean 45 cents?

A. The Clearmont rate of June 25th.

Q. You mean 65, don't you?

A. No, that is the Buffalo rate

Q. Exhibit No. 2——

A. 45 cents applied to Clearmont; 65 cents to Buffalo. I think that rate applies to practically all Colorado common points. I am

not certain about that, but it takes the blanket territory from
126 Colorado north.

Exam. Woodrow: 45 cent rate. The Examiner does not understand where you get that.

Mr. Hagman: That is one of the factors making up the——

The Witness: Making up the 65 cent rate; 45 from the Coast to Clearmont and 20 cents from Clearmont to Buffalo.

By Exam. Woodrow:

Q. And your contention is that that 45 cent rate at that time was a reasonable rate to Buffalo and that it should be increased under Ex parte 74 by 25 per cent, making 56½ cents, is that right?

A. Yes, sir.

By Mr. Hagman:

Q. Now, for how many miles, roughly, was that rate blanketed on the west end, point of production?

A. You mean north and south?

Q. Between the ends of the blanket. I want to get it just roughly.

A. I should say some 800 miles, on a guess.

Q. Now, the rate is blanketed at the Wyoming end also?

A. Yes, sir.

Q. What is the extent in miles there, roughly, of that blanket?

A. North and south in extent?

Q. Yes.

A. About five or six hundred miles.

Q. So when you take distances here in your Exhibit No. 2 and figure earnings per ton mile, it makes a good deal of
127 difference here as——

A. As the distances increase.

Q. —and the points you take in these blankets, doesn't it?

A. Yes, as the distance increases. In explanation, I took Birds, Colorado as one of my points because that was a blanket rate point, applied to a small line in Colorado in the blanket rate territory.

Q. Yes, and it was at the furtherest distance under the blanket?

A. I might have been able to find some line farther away, I don't know.

Q. So these figures as to earnings per ton mile would change depending on the town you use?

A. I call your——

Q. —in the blanket.

By Exam. Woodrow:

Q. Have you a point in this exhibit that shows the average haul in the blanket?

A. No, sir.

Q. To the average point in the other blanket?

A. No, I did not figure the average point of destination in the blanket, although I would think that Deadwood, South Dakota,

would probably be an average point, that is, a point half way, average point.

By Mr. Hagman:

Q. Do you think this exhibit is of any value to us in solving the question we have before us?

A. Certainly I do. I think it shows you the revenue that
128 resulted from the rates.

Q. Without knowing how much moved to these more distant points it does not mean anything, does it?

Mr. Campbell: Why not? Hasn't he got the right to compare that with the longer distance to show the long distance you are willing to haul this traffic for that rate, compared with his distance, which is very much shorter?

Mr. Hagman: Well, it is not shown how much traffic moved.

Mr. Campbell: It will be shown how much traffic moved, roughly.

By Mr. Hagman:

Q. Refer to your Exhibit No. 3, Mr. Brown. Will you please state what towns are included in the blanket on the Wyoming and South Dakota end? It commences just below Billings, does it not?

A. I do not quite get you. You mean on the 45 cent blanket—what towns are included in the 45 cent rate?

Q. Yes.

A. All points intermediate to Deadwood, South Dakota, on the Burlington, and all points there intermediate to Birds, and Loveland, betwen Billings and those points—are included.

By Exam. Woodrow:

Q. Points in this group save Buffalo?

A. Yes, sir.

Q. They are all in that blanket?

A. Yes, sir—shows on the map.

By Mr. Hagman:

Q. Are they also in the blanket from Spokane?

129 A. Yes, sir.

Q. Have you checked that up with the tariff?

A. My exhibit shows that rates from Spokane—for instance Exhibit 4 will show that. You will find lumber is the last item in the exhibit.

Q. What is the rate from Spokane to Spearfish?

A. To Spearfish, the present rate?

Q. Well, after June 25th?

A. 40 cents.

Q. The rate from Spokane is 38.

A. That is right, I will take that back—the two cent differential.

Q. Then the limits of the blanket are different on shipments originating in Spokane territory?

A. Spokane territory. That is not true, however, at Birds, Colorado.

Q. And now, referring to your Exhibit No. 4, you show from National a rate from June 25, 1918 of 65 cents, and to Spearfish, South Dakota, a more distant point, of 45 cents?

A. Yes, sir.

Q. Now, is it your contention that the Great Northern and the Northern Pacific and the C. B. & Q. should extend this blanket rate to points on an independent railroad? I call your attention to the fact that all points on this blueprint, No. 3 Exhibit, except Buffalo and Birds, are located on the main line of or branches of one
130 of the defendants, in this case, the *the* C. B. & Q.?

A. Yes, sir.

Q. Now, do you think that there is the same reason for extending the blanket to Buffalo that there is to these other points on the C. B. & Q.?

A. I think that if the 45 cent rate is a reasonable rate to Birds, Colorado, on the Great Western Railroad, then it is a reasonable rate to Buffalo, Wyoming.

Q. Well, we will go into this Birds feature of it later. I am not asking you that now.

A. I do not understand your question, then.

Q. My question is this: do you think that the same reason which actuated the Burlington to extend this blanket to Spearfish and Deadwood would exist for extending it to Ucross and Buffalo, on a railroad not owned or controlled by the C. B. & Q. or any of the defendants in this case?

A. I certainly do.

Q. For what reason?

A. Because, even though the Wyoming Railroad is not—was not a Federal Controlled Carrier, they took advantage of the rates authorized by Order 28 under the Administration, they were later relinquished, and the community of Buffalo, that is the business interests there are certainly entitled to the same rate that is extended to business interests some three or four hundred
131 miles further even though it is not on a branch line of one of the Federal-Controlled carriers or on one of the transcontinental carriers; in other words, I don't think just because they extend this through rate to Spearfish, on a branch line of the Burlington, 400 miles further, that the fact that Buffalo is located on a non-Federal Controlled line would be a justification for refusing them that rate.

Q. What do you consider the reason was for extending that blanket from South of Billings to distant points as Edgemont and Deadwood?

A. Because it has been the practice for years to blanket transcontinental lumber rates, and why they won't extend it to Buffalo I don't know—simply a practice of the carriers.

Q. A railroad can afford in some instances to blanket a rate to

more distant points on its own line where it could not do it to points on a connecting line not belonging to it, isn't that so?

A. That may or may not be true; depends on the rate and the return from that rate, whether they could afford to do it.

Q. If that rate were blanketed to Buffalo, as you ask, the charge received by the Burlington as far as Clearmont would necessarily have to be less than 38 cents on shipments from Spokane territory if the Buffalo road was to get anything?

A. They would have to absorb—the other carriers participating in the movement would have to absorb the division that was
132 paid to the Buffalo railroad.

Q. You do not answer my question. It is a fact that the Burlington would receive less for a shipment to Clearmont than it would to some point just south of Billings, for instance, wouldn't it, if it had to absorb part of the rate of the Wyoming Railroad, destined to Buffalo?

A. Destined to Buffalo, yes. That is the same thing as I stated before; they would have to receive less.

Q. Would you expect the Wyoming Railroad would take anything less than its local?

A. I never knew a division of a through rate that gave any carrier its full local or very seldom a division of a through rate that gives any carrier its full local.

Q. Do you think you are able to make up your mind that a rate of 38 cents can be extended to Buffalo without knowing what the financial condition and operating conditions of the Wyoming Railroad are, and as to how much they need to carry that shipment to Buffalo from Clearmont?

Mr. Campbell: That is objected to as not proper cross examination. On this question of divisions, the Commission has repeatedly held that if the carriers could not get together on what the division should be, the Commission themselves would fix it, and they are specifically given that authority now, as I understand it, under the law.

133 Exam. Woodrow: The question may be answered. Objection noted.

A. Yes, I think so. If the rate, the present rate on lumber, pine lumber, from Spokane returns the Wyoming Railroad Company something like 15 or 16 cents per ton mile, 16½ I think it is.

(The question was read.)

A. Carrying that shipment from Clearmont to Buffalo they would get 25 cents per 100 pounds for a 28½ miles haul, and I think that is sufficient revenue to enable them to reduce it.

Q. That is under Exparte 74?

A. Yes, present rates.

Q. Let us confine this to the rate after General Order No. 28. In other words, you consider simply the distance, isn't that a fact?

Isn't that the only fact that you consider—the distance from Clearmont to Buffalo?

A. In figuring——

Q. What a reasonable rate is?

A. That is one fact.

Q. What others did you consider?

A. I was going to say I consider water grade, cost of operation, but then I could not vouch for that—only second-hand information.

Q. You don't know everything about that?

134 A. And then I consider the showing of ton mile revenue.

Q. So that you consider this shipment should be carried 28½ miles from Clearmont to Buffalo for exactly the same charge as it should be carried 28 miles on the main line of the Burlington?

A. Yes, sir.

Q. And at the same time you know nothing about the conditions on the Wyoming Railroad?

A. No, I know nothing about them.

Q. Referring to your Exhibit No. 5, the earnings per ton mile that you show there would be more or less, according to the points on the blanket which you might select, isn't that true?

A. Yes,—Exhibit No. 5?

Q. Yes.

A. Yes, from the points of origination.

Q. Well, also as to the other end, at the points of destination?

A. There is only one destination.

Q. Well, there is a blanket at each end, is there not?

A. Referring to Exhibit No. 5, there is only one destination, and that is Buffalo.

Q. Well, that is true,—it will be just the blanket as to points of origin. Referring to your Exhibit No. 6, your purpose in getting up this Exhibit was to compare the earnings per ton mile if the Clearmont rate were extended to Buffalo, as compared with the earnings to Birds?

135 A. Yes, sir.

Q. To be of any value, such a comparison would have to involve similar railroads, operating conditions and traffic conditions, is that true?

A. I would not say to be of any value, no. I think it is of value for the purposes intended, without knowing anything about operating conditions.

Q. Do you know anything about the operating conditions on this G. W. R. R.?

A. No, sir, I do not.

Q. How much traffic they carry?

A. No, sir.

Q. What their earnings have been, or how much charge it is necessary for them to make to earn any revenue?

A. All I know is that the rate is the same to Birds as it is to Clearmont.

Q. Do you know anything about the competitive conditions that

might exist with reference to Birds that do not exist with reference to Buffalo?

A. I cannot imagine that there could be any competitive conditions there that would force that rate.

Q. And again in this exihibit as in another one, you simply considered the distance, did you not?

A. Yes, and showing the reasonableness of the rate that
136 obtained.

Q. And in figuring only distance, you did not distinguish between little, short independent lines and the same distance on the main line of a transcontinental railroad?

A. Well, I have shown here rates, for instance, to Birds, a point an equal distance from the junction, Loveland, as the distance would be to Buffalo on another short, little independent line where the rate is now established.

Q. Exhibit No. 7 is the same as Exhibit No. 6 except that it compares car mile earnings instead of——

A. Yes, car mile earnings should be corrected to show in cents instead of dollars.

Q. And what you said with reference to the previous exhibit is equally true with reference to this Exhibit No. 7, is it not?

A. Yes, sir.

Q. Do you know whether any joint rates to points on the Burlington Railroad are maintained on any other commodities?

A. I did not look it up, but I believe that you will find they are, both east and west on transcontinental traffic.

Q. Do you consider that a rate for a two-line haul should be any higher than for a one-line haul?

A. No, sir.

Q. You do not agree with the Commission in that?

A. Not in all instances.

Q. Well, do you here?

137 Mr. Campbell: He said no.

A. I said no, here.

By Mr. Hagman:

Q. Now, in asking for a lower through joint rate, are you claiming that the present rate is unreasonable—that both factors of the present rate are unreasonable, or only one?

A. I am not claiming to say that both or one of them are unreasonable. I do claim that the rate obtained from the two factors is an unreasonable rate.

Q. And you are able to say that without knowing anything about the Wyoming Railroad?

A. Yes. I presume that the rate that applies to Clearmont is a rate established by the Commission in some one of the various lumber cases that they have heard and decided in the last ten or fifteen years.

Q. Well, in view of the fact that that rate to Clearmont has been

established by the Commission, and the present rate is that same rate increased, do you say that is unreasonable?

A. I would not say that that was unreasonable, no.

Q. So you admit that the factor up to Clearmont is reasonable?

A. It may or may not be. I have made no study of that factor except as you see here. Now, if it is a rate that has resulted from an order of the Commission, then in all probability it is a reasonable rate; but when you extend that reasonable rate for 1,700 miles and refuse to extend it 28 miles, then you have a situation I am
138 complaining of.

Q. Notwithstanding the fact that you have got another railroad to deal with?

A. We are complaining of the through rate in and of itself.

Q. Doesn't it come down to this, then, that you claim the unreasonable part of this haul under such a rate is on the Wyoming Railroad?

A. No, I don't say that—I won't say that; I won't say that that is the unreasonable part of the haul. I think the rate that results from the two combinations is unreasonable. Which factor is the most unreasonable, I don't know.

Q. That is rather inconsistent with the statement you just made.

A. Possibly I did not quite get your first question right.

Q. If it should develop during the course of this case that the Wyoming Railroad was a little short road in a sparsely settled country and required five or six times as high a rate as the Burlington to exist at all, would that change your opinion as to whether you could compare that railroad with similar mileage on the C. B. & Q.?

A. No, because even though, as you say, it might be a short, poor road, I think the establishing of a through rate to Buffalo would greatly increase its volume of traffic and build up the territory at Buffalo to the extent that it would return them an equal revenue to what they get now. It would not reduce the rate the en-
139 tire amount in all probability. They would get a division from the transcontinental carriers that would be somewhere nearly equal to their local rate.

Q. Would you expect the transcontinental carriers to absorb the difference?

A. Well, that is true in the natural course of events.

Q. And the Commission has already held that rate reasonable up to Clearmont?

A. I did not say that. I say I presume that is a commission-made rate. I don't know it to be true.

Mr. Campbell: Held it reasonable and approved it too.

The Witness: They held it reasonable to Clearmont.

By Mr. Hagman:

Q. Well, that comes back to the same thing again, doesn't it, that you consider only distance and not earnings or operating conditions or traffic conditions or anything like that?

Mr. Campbell: I submit that counsel has been over that three or four times, and he is taking up time unnecessarily.
Exam. Woodrow: The record will show that.

A. I answered all those questions, in preparing this statement, of what I intended to show.

Mr Hagman: That is all I have now.
Exam. Woodrow: Any questions, Mr. Campbell?

Redirect examination.

By Mr. Campbell:

Q. What is the distance from Laurel to Birds, or from
140 & 141 Laurel to Loveland, say?
A. From Billings to Birds is 614 miles.
Q. What is it from Laurel to Birds?
A. From Laurel, I think there is just ten miles difference.
Q. What is the distance from Laurel to Buffalo?
A. From Laurel? I figured on Billings.
Q. And what is the distance from Billings to Buffalo? Mr. Brown, you figure up those distances and have them in the morning. I would like to know the distance from Laurel to Billings, Billings to Clearmont, Clearmont to Buffalo, and from Laurel to Loveland and from Loveland to Birds.

Exam. Woodrow: You may ask him those questions in the morning. Are there any other questions?

By Mr. Campbell:

Q. Mr. Brown—if I could ask him one or two in the morning that will finish it up as far as I am concerned.

Exam. Woodrow: That will be satisfactory to the Examiner. We will take a recess until 9:00 o'clock in the morning, gentlemen.

(Whereupon at 5:20 P. M. September 16, an adjournment was taken until 9:00 o'clock A. M., September 17, 1920.)

142 Spokane, Washington,
Sept. 17, 1920—9.00 o'clock a. m.

Met pursuant to adjournment.

Present: Parties as previously noted.

R. S. Brown resumed the stand.

Redirect examination (continued).

By Mr. Campbell:

Q. I asked you last night, Mr. Brown, for some distance figures. Have you those?

A. The distance from Laurel to Clearmont, Wyoming, is 196.1 miles; the distance from Clearmont to Buffalo is 28½ miles; the distance from Laurel to Buffalo is 224.6 miles; the distance from Laurel to Loveland is 595.2 miles; from Loveland to Birds 4.1, making a distance of 599.3 miles from Laurel to Birds.

Mr. Campbell: I think that is all I care to ask Mr. Brown now.

Mr. Hagman: I have no further questions.

By Exam. Woodrow:

Q. Your testimony, Mr. Brown, has dealt entirely with the allegation of unreasonableness under Section 1, has it not?

A. Yes, sir.

Q. You did not intend to develop any facts under any other Section?

143 A. No.

Mr. Campbell: No, we have other witnesses for that purpose.

Exam. Woodrow: You may stand aside. Call you next witness.

(Witness excused.)

P. M. BACKUS was thereupon called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Campbell:

Q. Give your full name to the Reporter.

A. P. M. Backus.

Q. Where do you reside?

A. Buffalo, Wyoming.

Q. What is your business?

A. Engaged in the retail lumber business.

Q. Do you hold an office in either of these complaining companies?

A. President of the Buffalo Lumber Company.

Q. How long have you lived in Buffalo?

A. Since February, 1916.

Q. You are familiar with the conditions in and around Buffalo?

A. Yes, sir.

Q. Mr. Backus, did your company pay the expense bills shown on the complaint for shipments by the Buffalo Lumber Company?

(Witness examines expense bills.)

Exam. Woodrow: Mr. Campbell, the Examiner thinks it may be well to frame that question in a different manner as to ask
144 when the shipments involved in this complaint moved, and if they paid and bore the charges thereon, and there appear to be so many shipments they will be submitted under Rule 5.

By Mr. Campbell:

Q. Supposing I ask it this way: did the shipments move at the time and in the manner specified by the exhibits in your complaint?
A. They did.
Q. And did your company pay the charges as shown by the continuation of Exhibit "B" in said complaint?
A. We did.
Q. Is that matter as the Examiner wants it?

Exam. Woodrow: That is all right, sir.

By Mr. Campbell:

Q. Mr. Backus, what is the nature of your business at Buffalo?
A. It is a retail lumber business.
Q. You are not a manufacturer?
A. No, sir.
Q. You buy lumber, you go out in the market and buy lumber to the best advantage you can, ship it in there, and it is sold at retail?
A. Yes, sir.
Q. Do you handle coal?
A. No, sir.
Q. Anything but lumber and shingles, lumber products?
A. Lumber and building materials.
145 Q. What is your competition there, Mr. Backus?
A. We have one competitor in the town, the Pioneer Lumber Company. Then of course we are competing more or less with the surrounding towns.
Q. How does the fact that the lumber rate is blanketed all over that territory and not blanketed to Buffalo affect your business?
A. It works rather a hardship on us. The towns on the main line have and enjoy a much lower rate than we do.
Q. And can they and do they compete right into your town?
A. We have no instances where they have competed right in Buffalo, but they naturally cut off our territory.
Q. In what directions and in what way? Just explain fully.
A. Well, to Sheridan, which is 38 miles north of us on the main line of the Burlington, they enjoy the blanket rate, and for that reason we are limited to about eight miles north of us.

By Exam. Woodrow:

Q. Where is Sheridan with respect to Billings? It is not shown on Complainant's Exhibit No. 3.

Mr. Brown: Between Billings and Clearmont.

Q. How did you figure that distance, Buffalo to Sheridan?
A. That is a wagon road between Sheridan and Buffalo.
Q. And you sell your lumber by wagon? You don't attempt to ship it by rail?
A. Well, we ship our lumber—it comes in by rail from
146 Clearmont. I was talking about the farmers that live between Buffalo and Sheridan. They naturally cannot afford to come to Buffalo further than eight miles out from Buffalo; they go to Sheridan.

By Mr. Campbell:

Q. And your territory north of Buffalo is virtually cut off entirely is it, by this rate structure?
A. Yes, sir.
Q. In other words, Clearmont and Sheridan get their commodities by the blanket rate while you have to pay the arbitrary over Clearmont of 25 cents?
A. Yes, sir. There is another yard at Ulm. That is between Sheridan and Clearmont—and we have them to compete against too.
Q. Is there one at Arvada?
A. Yes, sir.
Q. Is there any between Buffalo and Clearmont?
A. Yes, sir.
Q. What point is that?
A. Ucross.
Q. That is one of the points where you are also asking for joint blanket through rates?
A. That is owned by the Pioneer Lumber Company. We are not asking it.
Q. Have you any competition from Caspar?
A. Yes, sir.
147 Q. Where is Caspar located?
A. It is on the N. W. and the Burlington in the southern part of the State.
Q. Are they within the blanket?
A. Yes, sir.
Q. How does your competit-on come with Caspar?
A. The distance from Buffalo to Caspar is approximately 135 miles. We have not competed with them until just recently. There is a new oil field being opened up about twelve miles south of Kaycee.
Q. South of what?
A. Kaycee, a little inland town, and this new oil field is approximately 60 miles from Buffalo and approximately 75 from Caspar.

Exam. Woodrow: Now, where is Kaycee?
Mr. Campbell: Between Buffalo and Caspar; doesn't show; it is a little inland town where this oil has recently been discovered.

By Mr. Campbell:

Q. How would that be in relation to Sussex?
A. Kaycee is about 20 miles west of Sussex.
Q. So that could be marked on the map. Now, Caspar is within the blanket?
A. Yes, sir.

Q. While Buffalo, if you wanted to reach Kaycee, it is a
148 shorter distance than it is from Caspar, but you have to pay this arbitrary of 25 cents which Caspar does not have to pay?
A. Yes, sir.
Q. What is the distance, if you know, from Laurel to Caspar?
A. I could not answer that.

Mr. Campbell: May we supply the record with the distance later?
Exam. Woodrow: Yes.
Mr. Campbell: The distance from Laurel to Caspar.
Exam. Woodrow: The map will show. Where is Caspar with respect to Birds?
Mr. Campbell: Caspar is north of Birds. Birds is in Colorado and Caspar is about the center of the map, almost directly south of Kaycee—almost directly south of Cedar Cliff, right at the junction of the Sweetwater River. I would like to supply that distance from Laurel to Caspar and from Billings to Caspar.

By Mr. Campbell:

Q. Let the record show the distance from Billings to Caspar is 320 miles. Mr. Backus, are you familiar with the operating conditions of the Wyoming Railroad?
A. I don't understand just exactly what you mean.
Q. Well, as to grade on the road to Buffalo.
Exam. Woodrow: Before you start on a different line, Mr. Campbell, Caspar would be the only town, Mr. Backus, to furnish lumber to Kaycee, this new oil town? Would not the other towns
149 on the Burlington branch from Laurel to Caspar be nearer? Isn't it the logical town from which to ship this commodity?
A. Caspar is the nearest town to this new oil field, that is, on that line.

By Exam. Woodrow:

Q. How far is Thermopolis from this oil field?
A. Thermopolis is across the Big Horn mountains, across the mountain range.

By Mr. Campbell:

Q. Is there any other road in there from Thermopolis?
A. Oh, you can go by auto. It is a long, round about way down around in the mountains.
Exam. Woodrow: The map I think does not show the mountains;

it just shows the distances that these towns along the Burlington would be nearer than Caspar.

By Mr. Campbell:

Q. But in any event if they did go in from those towns, any of those towns there on the Burlington, they enjoy the blanket rate, do they not?

A. Yes, sir.

Q. So that your competition would be the same and you would be the same distance, even if it did go in from any of those other towns.

Exam. Woodrow: The Examiner would like the record to show, however, just what towns enjoy preferential treatment that compete with the Buffalo company.

150 By Mr. Campbell:

Q. Well, are there any other towns where supplies are going into the Kaycee district except Caspar and Buffalo?

A. Not that I know of.

Exam. Woodrow: As the Examiner understands it so far, the towns mentioned are Ulm, Clearmont and Caspar.

Mr. Campbell: And Arvada.

By Exam. Woodrow:

Q. And Arvada. Are there any other towns where you have competition?

A. No, practically not.

By Mr. Campbell:

Q. Are you familiar with and have you been over the line between Buffalo and Clearmont frequently?

A. Yes, sir.

Q. Are you familiar with the grades or the operating conditions of that line, so far as appearances go, in going over it?

A. Why, regarding grade, it follows a creek, Clear Creek, from Clearmont to Buffalo.

Q. So that it is a water grade?

A. Yes, sir.

Q. What is the nature of the country surrounding Buffalo and Clearmont? What is the nature of the industries in and about there?

A. You take along the line of this Wyoming Railway it is all farming district.

151 Q. Sparsely or well settled?

A. Well, it is all irrigated land and developed, settled up, becoming more and more settled up all the time.

Q. Is it a comparatively new district?

A. It has been farmed for many years, but now some Danish people are coming in, taking up and buying this land.

Mr. Campbell: I think you may inquire.

Cross-examination:

By Mr. Hagman:

Q. Mr. Backus, the shipments which were made to the Buffalo Lumber Company are shown in Exhibit "B" on page 7 of the complaint, are they not?

A. Yes, sir.

Q. Twelve in number. You are engaged in the retail lumber business in Buffalo?

A. Yes, sir.

Q. And I presume you bought these cars of lumber, had them shipped to you as consignee at Buffalo?

A. Yes, sir.

Q. Did you buy them f. o. b. Buffalo or point of shipment?

A. Bought them f. o. b. Clearmont.

Q. So that you paid a fixed price for the lumber delivered at Clearmont?

A. Yes, sir.

Q. And then you paid the charge made by the Wyoming Railway?

A. Yes, sir.

152 Q. Did the person from whom you purchased these cars at any time reimburse you for the charges which you paid to the Wyoming Railway?

A. No, sir.

Q. That came out of your own pocket?

A. Well, I don't know—coming out of our own pocket; I guess practically it is.

Q. What difference is there in the price of lumber, your price of lumber at Buffalo, and the price at the same time at Sheridan and other points on the main line of the Burlington?

Mr. Campbell: I would like to have the record show that this is objected to as incompetent, irrelevant and immaterial, and inadmissible under the Dalzell Case, in order that we may preserve our rights; and as not cross examination.

Exam. Woodrow: The objection is noted. The question will be answered.

(The question was read.)

A. We try to get the main line prices, that is, the prices at which lumber is sold at Sheridan and Clearmont, plus the freight that we pay on the Wyoming Railway, but we cannot always do that.

By Mr. Hagman:

Q. But when you can do that, you make the same price that the man on the main line at Sheridan, for instance, does?

153 A. Yes, we try to do that.

Q. And are you able to say in how many instances you were unable to protect yourself against the charges on the Wyoming Railroad in these shipments referred to in your complaint?

A. No, sir, I could not say that.

Q. Well, as a general thing, would you say that you sold the lumber mentioned in this complaint for sufficient to offset that charge that was made by the Wyoming Railroad Company?

A. As a general thing, we cannot do that.

Q. Well, you are unable to give us any definite figures, then, I assume?

A. No, I cannot give you any definite figures on that.

Q. So that on some of these shipments you passed the extra charge that you had to pay on account of being located on the Wyoming Railroad, on to the consumer?

A. Yes, sir.

Mr. Campbell: This objection I assume will show as going to all this testimony without objecting to each specific question, that is, to this line of testimony, on the ground that it is inadmissible under the Dalzell Case. I don't want to be objecting each time.

Mr. Hagman: That is understood.

Exam. Woodrow: The record will be clear on that point that you will have a standing objection to this line of questioning.

By Mr. Hagman:

Q. If you had a cheaper rate into Buffalo than you have

154 now, in a great many instances it would not make any difference in your profit in the way you have been doing business, would it?

A. You mean our profit as a whole or our lumber business?

Q. On the lumber business.

A. If we had a cheaper rate our profits would certainly be better. We could do more business, taking it in general terms.

Q. Well, you mean that you would be able to sell more lumber, is that the idea?

A. Yes, sir, we could sell lumber cheaper, and we could take in a larger territory, and selling lumber cheaper, we could certainly sell a lot more of it.

Q. But as far as your profits are concerned, they would not be any different, because you say now you are passing that extra charge on to the consumer?

A. Our profits per thousand feet would not be any greater, no.

Q. That is what I mean.

A. The consumer would get a lower price.

Q. At what places does your company maintain lumber yards?

A. We have a yard at Buffalo; a small yard at Kaycee, Wyoming.

Q. The lumber you buy for your Kaycee yard, I presume you ship to Caspar?

A. No, sir, ship to Buffalo.

Q. And then take it down to Kaycee?

155 A. Yes, sir.

Q. Wouldn't it be cheaper for you to ship it to Caspar and take it up to Kaycee?

A. No, sir.

Q. How can there be any competition, then, from Caspar, because of the blanket rate at Caspar, when you can afford to ship over the Wyoming Railway at 20 cents and haul it clear down to Kaycee?

A. Because these new oil fields are within ten miles of Kaycee.

Q. What I am getting at is this; you stated that maintaining this blanket rate down to Caspar worked a discrimination, didn't you?

A. I did, regarding these oil fields, yes, sir.

Q. Well, if that is true, and that is a more favorable rate, why do not the people around Kaycee buy from Caspar?

A. It is 85 miles from Caspar to Kaycee.

Q. Well, then, if they do not buy from Caspar because of the distance, how are you damaged by any rate that might be maintained to Caspar?

A. We are damaged—we cannot get into this oil field; we are paying 25 cents a hundred more than the Caspar people's rate.

Q. Perhaps I do not make myself clear; where are these oil fields located with reference to Kaycee?

A. They are about ten miles south.

Q. And is there a road between these oil fields and Caspar?

156 A. Yes, sir.

Q. Do any of the people at the oil field wanting lumber ever go to Caspar for it?

A. Yes, sir.

By Exam. Woodrow:

Q. What is the mileage from Buffalo to the oil fields?

A. About 60 miles.

Q. And you take this lumber over roads?

A. Yes, sir, by trucks.

Q. By truck?

A. Yes, sir.

By Mr. Hagman:

Q. Now, at the present time what would it cost a man at these oil fields to go to Caspar and get lumber and get it back to the oil fields?

A. I don't know what those trucking companies are charging from Caspar to the oil field.

Q. But you are able to maintain this yard at Kaycee and sell lumber to the oil fields and make a profit?

A. We have not yet, no, sir. We haven't sold any lumber to them yet.
Q. Who are your customers at Kaycee?
A. They are ranchers around there.
Q. How long have you been maintaining that yard at Kaycee?
A. Since 1916.
Q. Then your customers there are the ranchers in the vicinity of Kaycee?
157 A. Yes, sir.
Q. Do any of those ranchers go down to Caspar?
A. Some of them do,—have gone there.
Q. Do they get a better price by going down to Caspar?
A. Yes.

By Exam. Woodrow:

Q. At a price delivered at Caspar—do they buy their lumber at Caspar?
A. Yes, sir.
Q. And do their own individual hauling?
A. Yes, sir.

By Mr. Hagman:

Q. How can they get it to Kaycee? Let us speak of the price of lumber at Kaycee; can they get it to Kaycee cheaper by going down to Caspar than by going to Buffalo for it?

Mr. Campbell: It does not seem to me as though that is quite a fair question when he has stated that these ranchers down there buy it at a cheaper price and do their own trucking. Of course we all know that the rancher does not count his own work, as a rule, but that is the competition he has to meet, however. The same is true if you haul from Buffalo.

Mr. Hagman: What I am getting at is this; he has stated that maintaining this blanket down to Caspar works discrimination against him. I am trying to find out just why, and to what extent.

Exam. Woodrow: The Examiner thinks that the question is proper. There is a 60 mile haul from Buffalo by truck and
158 an 85 mile haul from Caspar by truck to Kaycee. Now, it is proper to see how much it would cost to haul lumber 85 miles by truck from Caspar to Kaycee and how much it costs to haul lumber from Buffalo to Kaycee.

By Mr. Hagman:

Q. Now, maybe we can get at it in this way; Mr. Backus, suppose you were living at Kaycee now, and wanted to build a house and wanted to get some lumber. Could you go to the Buffalo Lumber Company at Kaycee and buy that lumber as cheap as you could go to Caspar and buy it and then haul it back to Kaycee?
A. It would all depend on what it would cost me to get it, and haul from Caspar to Kaycee. I don't know what they figure.

Q. Well, what percent of the lumber sold in Kaycee and that vicinity, does your firm sell?

A. We sell practically all the lumber north of Kaycee, between Buffalo and Kaycee; we sell west of Kaycee and east of Kaycee.

Q. Well, is there any lumber used just south of Kaycee?

A. There has not been up until just here within the last month, I should say—not quite that long.

Q. If you are able to do all the business around Kaycee, as you have stated, how does the maintenance of any rate to Caspar work a discrimination against you?

Mr. Campbell: He has just stated that field has opened up within 30 days, but that he has not been able to enter that field on account of the rate structure.

159 Exam. Woodrow: When the complaint was brought, he had no complaint against that rate to Kaycee.

Mr. Campbell: No, not at that time, but he has now, because within a month there has opened up this oil field, and he has made it clear, it seems to me, that because of the rate structure he is not able to reach the territory of the oil field at all.

By Mr. Hagman:

Q. What other reasons are there that you cannot get into the oil field besides the one that you have assigned? Is there a road in there?

A. There is a road under construction. I understand you can get in within about three miles on a good road, and the County Commissioners say that they are working on a road over those three miles.

By Exam. Woodrow:

Q. Do you do your own trucking from Buffalo to Kaycee?

A. Yes, sir, we have our own trucks.

Q. How much does it cost you per thousand feet to take your lumber down to Kaycee?

A. We figure from $25.00 to $35.00 a thousand.

Q. Does it cost twice that much to haul it from Caspar the 20 miles of additional haul?

A. Yes, sir, costs at least that much.

By Mr. Hagman:

Q. Cost more, wouldn't it?

A. Yes, sir.

160 Q. Now, when this road is built into the oil fields, do you expect to do business in the oil fields from your Kaycee yard?

A. We are going to try to—come mostly directly from Buffalo.

Q. Do you expect to be able to do business in there?

A. That is what we are going to try to do. It is going to be a hard proposition when we have our 25 cents per hundred pounds extra to pay on the Buffalo end.

Q. How much a thousand is that 25 cents?

A. Well, it runs from $6.00 to $7.50 a thousand.

By Exam. Woodrow:

Q. But you always have the privilege of buying it at Caspar and taking it up to Kaycee, haven't you?
A. Yes, we have that privilege.

By Mr. Campbell:

Q. But you have no yard at Caspar?
A. No, sir.

By Mr. Hagman:

Q. Now, just to summarize this before we leave it, up to this time you have been able to do business at Kaycee and in the vicinity of Kaycee have sold practically all the lumber used in that vicinity. That is correct, is it not?
A. Yes.
Q. And the rate to Caspar has not made any difference with reference to your business at Kaycee so far?
161 A. Oh, it has made a difference, yes. As I said before, some of them go to Caspar.
Q. And what you are apprehensive about is getting into this oil field in the future?
A. Yes, sir.
Q. And there is no road in there yet so that you do not know so far on what terms you can compete in there?
A. No, not exactly.
Q. And the rate to Caspar is more favorable than from Buffalo, and you can get your lumber up to the oilfields from Caspar?
A. No, we could not, unless we would establish a lumber yard at Caspar, and we cannot do that.
Q. You can have carloads of lumber shipped to Caspar and trucked without having a yard at Caspar, can't you?
A. We could do that, but it is a very expensive proposition.

Mr. Campbell: Are you maintaining that you can compel by a rate structure, a man to locate and establish a business at a certain locality?

Mr. Hagman: No, by no means. I am trying to work out how this rate to Caspar affects his business, how it works discrimination. I have been unable to get that through my head.

By Mr. Hagman:

Q. Now, the other points you stated that were being preferred by the maintenance of this blanket rate on the Q. I think you said were Sheridan, Ulm and Arvada?
162 A. Yes, sir. No, I did not state that we had any competition at Arvada; we do not compete with Arvada.
Q. Just where are the consumers located who go to the main line of the Burlington and buy their lumber instead of going to Buffalo, because of this difference in rate?

A. They are located all along the road between Buffalo and Sheridan.

Q. There is a highway, is there not, between Buffalo and Sheridan?

A. Yes, sir.

Q. And it is the people who are located along and tributary to this highway who go up to the main line of the Burlington and buy their lumber instead of from you?

A. Yes, sir.

Q. Now, are there any other reasons why the people along this Highway should go to Sheridan to buy their lumber, besides the difference in the price? What I mean is this: do they buy their groceries and other things at Sheridan?

A. I presume they do, yes, sir.

Q. Can you think of any other reason why they should go to Sheridan for their lumber besides the difference in the rate that you have mentioned?

A. The difference in the price is the only reason they did so. It is an easier road, the road is better to come to Buffalo; it is up
163 the hill over half way to go to Sheridan, and to Buffalo it is an easier grade, coming into Buffalo.

Q. Now, at the present time, how far north of Buffalo along this road have you been able to do business?

A. About eight miles from Buffalo north.

Q. After you get north of that eight miles they find it is to their advantage to go to Sheridan?

A. Yes, sir.

Q. But the people within eight miles of Buffalo find that the cost of hauling from Sheridan is more than the cost of paying the extra freight charge when they go to Buffalo.

A. Yes, sir.

Q. Now, if you had the same rate to Buffalo that Sheridan has, how far north would you expect Buffalo to do business?

A. I would expect Buffalo to do business half way to Sheridan.

Q. That would be about 19 miles?

A. 19 or 20, yes.

By Exam. Woodrow:

Q. What was your testimony with respect to the road from Sheridan to Buffalo?

A. I said that the road was a better grade from Buffalo north. There is quite a divide between Buffalo and Sheridan, and these people living within eight miles of Buffalo have to pull over this divide to get into Sheridan.

Q. Then it would be a better grade south, wouldn't it? The road to Buffalo would be better than to Sheridan?

A. That is what I say, yes, sir; the road is a better haul
164 out from Buffalo north than it is for them to go to Sheridan.

Q. Where is this divide, how far from Buffalo?

A. It is about half way *way;* it is a little more than half way from Sheridan to Buffalo. In the winter time and the wet time

of the year, the road is more sandy on the Buffalo side of the divide, and the roads do not get as muddy.

Q. A person on the other side of the divide would naturally go to Sheridan, though?

A. Yes, sir.

Q. And a person on the side nearer to Buffalo would go back to Buffalo?

A. Yes, sir.

Q. If the rate was the same.

A. Yes, sir.

Q. That divide comes about Eighteen miles from Buffalo?

A. Yes, sir. It is right around eighteen miles north of Buffalo.

Q. Is the country over the sand eight or ten miles between the point where you do business and the divide thickly settled?

A. It is not nearly as thickly settled as on the Sheridan side of the divide.

Q. If the rate were the same you would not expect to get as much business as Sheridan man, as the Sheridan dealer, because of the sparsity of population nearer Buffalo?

A. We should get about the same for this reason; there is a little town between Sheridan and Buffalo called Story; it is
165 a summer resort place; a lot of people from Sheridan own some homes out there, and this last summer there have been quite a number of homes built there, and all of this business has come from Sheridan, notwithstanding the fact that they have to pull up over what we call Tunnel Hill, which is quite a haul, and makes a distance of about 23 miles from Sheridan to Story, while we are about 20 miles from Buffalo to Story and we have no hill to pull over. If we had the same rate from Sheridan there is no question but what we could have done more than half of this business that has been done at Story.

Q. Do you deliver your lumber?

A. We do if we get paid for it.

Q. Do your competitors deliver their lumber?

A. They have no branches of their own. I think they get delivered prices and hire some trucking people to haul it. I understand they do.

Q. How does your delivered price at Story for the haul compare with the freight rate from Clearmont to Buffalo?

A. We haven't delivered any at Story.

Q. How would it compare if you were to have the business, along your scale of delivered prices?

A. It would be about 40 cents per 100 pounds if we hauled it by truck from Buffalo to Story—depending on the rates and the time of the year.

Q. That would be almost twice as much as you pay from
166 Clearmont down?

A. Our rate is 25 cents now.

Q. Do you think it is unreasonable for the Wyoming Railroad to get 25½ cents that you charge 40 cents for—a shorter haul?

A. I do not see how you can compare a truck haul with a railroad haul.

Mr. Campbell: There isn't any question here as to trucking rates, as I understand it.

Exam. Woodrow: The Examiner had the question in his mind, and therefore he asked it. If it is irrelevant the record will show.

By Mr. Hagman:

Q. Mr. Backus, how much of a difference would you have to have in order to compete with the people from Sheridan—how many dollars per thousand or cents per 100 pounds?

A. Well, we should have—our lumber should cost us the same as the Sheridan people, if we try to compete with them.

Q. You could complete with them if you could get it in Buffalo at the same price?

A. Yes, sir.

Q. I presume the people at Buffalo desire to have that Wyoming Railroad continue to operate in there?

A. I presume so, yes, sir.

Q. And they would not care to go back to the old days
167 of hauling everything from the main line of the Burlington?

A. No, I hardly think so.

Q. I assume also they want to see the Wyoming Railroad Company charge sufficient rates to be able to continue to exist?

A. Yes, I think so.

Mr. Hagman: I think that is all.

Redirect examination.

By Mr. Campbell:

Q. Mr. Backus, farmers as a rule do not hire trucks to deliver their lumber to them, do they?

A. No, sir, they usually have their teams or their own trucks.

Q. And do their own delivering?

A. Yes, sir.

Q. Now, no matter where you attempt to do business in that territory you do have that handicap of $6.50 to $7.50 per thousand which Sheridan is able to make on account of the freight rate.

Mr. Hagman: I do not ordinarily object to leading questions, but you are going pretty far.

Mr. Campbell: This is redirect.

Mr. Hagman: I know, but ask him the question.

Exam. Woodrow: Restate your question, please, Mr. Campbell, to obviate the objection.

By Mr. Campbell:

Q. I don't think that is a leading question. I am asking him if there is any point in there in that territory surrounding Buffalo, between Buffalo and Sheridan where you do not have to over-
168 come the handicap of $6.50 to $7.50 per thousand?

A. Yes, sir.

Q. Where is that?

A. I did not understand. No, there is no point.

Q. And is that also true for the oilfields or Caspar?

A. Yes, sir.

Q. And is it possible for you to reach the oilfields around Kaycee in competition with Caspar without absorbing or in some way overcoming this handicap in rates?

A. No, sir.

Q. Now, if your rate was the same as Caspar, Sheridan and Clearmont, would you or would you not be able to extend your territory and business?

A. We would.

Q. Would it increase the business of the Wyoming Railroad?

A. It certainly would.

Q. Now you stated, Mr. Backus, that some of this lumber was bought f. o. b. Clearmont. Who pays the freight on that lumber that is delivered f. o. b. Clearmont—who pays the freight to Clearmont?

A. We do.

Q. Even though it is bought f. o. b. Clearmont. How is it handled in regard to the freight?

A. We pay the Wyoming Railway Company the total amount of the freight bill, including the freight charge on the trunk
169 lines, and their charge for bringing it from Clearmont to Buffalo.

Exam. Woodrow: The Examiner understood you bought all of your lumber f. o. b. Clearmont.

Mr. Campbell: I will explain that. That is what I am getting at now.

The Witness: We do.

By Exam. Woodrow:

Q. You do buy all of your lumber f. o. b. Clearmont?

A. Yes, sir.

By Mr. Campbell:

Q. Explain how that is done.

A. I started to tell you the way those freight bills are handled. The Agent of the Wyoming Railroad Company at Buffalo collects for the full amount of the freight rate on the car, including the amount charged by the trunk lines and the amount charged by the Wyoming Railway Company. Then when we settle with the lumber

companies for this lumber, we deduct from our invoice, the amount of freight paid from the point of origin to Clearmont.

Q. So that you pay then, what for your lumber?

A. We pay delivered price.

Q. The delivered price, does it or does it not include the freight?

A. It does.

Q. So that you in final payment of this lumber actually
170 pay these freight bills?

A. We do.

Q. As a part of the purchase price of the lumber?

A. Yes, sir.

By Exam. Woodrow:

Q. The Examiner does not understand that. He understands that you get credit from the lumber company for the freight rate from origin to Clearmont, as such.

A. Yes, sir.

Q. And therefore you do not pay and bear that part of the transportation charge; you are only paying and bearing the transportation charge from Clearmont to Buffalo, is that right?

A. No, sir. The mills have what they call the mill price. In figuring out their delivered rates they take their mill price and add the amount of the freight to the price, so we are paying the freight, just the same as though we bought it at the mill. We pay the freight.

Q. What did you mean, then, by saying you buy f. o. b. Clearmont? Why don't you buy it f. o. b. mill?

A. Because they won't sell it to us that way.

Mr. Hagman: That is the usual way of selling lumber in this country, Mr. Examiner. It is f. o. b. Clearmont. Then the purchaser pays the freight up to Clearmont and deducts that from his invoice price.

Mr. Campbell: The freight is added to the invoice. The price, as I understand it, is the mill price; then the freight is added
171 and that is billed with the entire amount, including the freight, and he pays it and deducts the freight from the invoice, to which the freight had been added; so that in actuality he pays the mill price plus the freight to Clearmont.

Exam. Woodrow: Then the statement that he buys lumber f. o. b. Clearmont is a fiction?

Mr. Campbell: It is, in actual practice it is a fiction.

Exam. Woodrow: And in reality——

Mr. Campbell: In reality it is a fiction.

Exam. Woodrow: And therefore if any reparation is granted in this case by the Commission, the Buffalo Lumber Company would be entitled to the reparation?

Mr. Campbell: Absolutely.

Mr. Hagman: I don't think there is any question about that. That is, I am willing to admit that they paid it. But as I stated

before, I am making the point that he passed it on to the consumer. I am not waiving that.

Exam. Woodrow: The Examiner understands that point, but this f. o. b. Clearmont proposition had him confused, and he wants it cleared up that in the event the Commission should award reparation there is no question as to the complainant having paid and bore the charges.

Mr. Hagman: No question as to who paid the charges, that is, the complainant paid them.

Exam. Woodrow: All right, sir, that is clear, so we will
172 proceed.

By Mr. Campbell:

Q. Mr. Backus, what is the volume—have you got a statement of the volume of business done by you over this Wyoming Railroad?

A. Yes, sir.

Q. Will you just roughly state about what the volume of business is over this line by your company?

A. From the first of January, 1918 up to September 1st, 1920, we shipped in a total of 122 cars of lumber and building material.

Q. Are there other firms doing business at Buffalo, different lines of business there?

A. Yes, sir.

Q. And is there a considerable volume of business in this same line that you are in that is done by others?

A. The lumber business?

Q. Yes, sir.

A. Yes, there is another lumber company there, the Pioneer.

Q. Is there anything else you think of that you desire to state, Mr. Backus?

A. No, sir.

By Mr. Hagman:

Q. One question, please. As far as rates are concerned, other merchants in other lines of business are in the same position you are at Buffalo?

A. Yes, sir.

173 Q. So far as to being able to do business further north?

A. Yes, sir.

Q. Your two main objections, as far as discrimination is concerned, is on account of the oil fields and the territory between Sheridan and Buffalo, as I understand?

A. Yes, sir.

Mr. Hagman: That is all.

By Exam. Woodrow:

Q. One question, sir. The Examiner understood you to say in the beginning that Arvada was a point that you allege was given

preference, and then you corrected and said Arvada was not preferred?

A. That is true.

Mr. Campbell: I think I was the one that said that.

By Exam. Woodrow:

Q. Then the points are Sheridan, Ulm, Clearmont and Caspar?
A. Yes, sir.
Q. The four points. That is all.

(Witness excused.)

Mr. Campbell: Call Mr. Heilman.

L. I. HEILMAN was thereupon called as a witness, and having been duly sworn, testified as follows:

By Mr. Campbell:

Q. Give your full name to the Stenographer.
A. L. I. Heilman.
Q. Where do you live?
A. Sheridan, Wyoming.
174 Q. How long have you lived there?
A. Since 1912.
Q. Have you any connection with the Pioneer Lumber Company?
A. Yes, sir.
Q. What position do you hold?
A. I am secretary and Treasurer.
Q. Have you yards at Buffalo?
A. Yes, sir.
Q. Have you one at Ucross?
A. Yes, sir.
Q. Did your company make the shipments as shown by the Exhibits "C" and "D" in the complaint? Were those shipments made by your company as shown in Exhibits "A," "B," "C" and "D?"
A. Do you want me to check each one of them to see?
Q. Not if you are familiar with them.
A. I checked this over before, and it is correct. These cars were all received by our company.
Q. And shipped on the dates and virtually in the manner shown there?
A. Yes, sir.
Q. Who paid the freight?
A. Pioneer Lumber Company.
Q. There are a number of these, and I presume they will be submitted under Rule 5 also?
175 Exam. Woodrow: Yes, they will be handled in accordance with the provisions of Rule 5.

By Mr. Campbell:

Q. What competition do you have to meet at Buffalo and Ucross?
A. Well, at Buffalo we meet particularly Sheridan and Clearmont competition.

By Mr. Hagman:

Q. Have you a yard at Buffalo?
A. Yes, sir.

By Mr. Campbell:

Q. And at Ucross. Will you go on and state how you are handicapped on account of these Buffalo rates, and then go on in your own way and state what is the effect on your business, your business at Buffalo and Ucross?
A. It is all a matter of price. On account of the extra cost of our material delivered at Buffalo and Ucross our prices—in order to make a fair profit—must necessarily be quite a little higher than the prices that are made by yards located on the main line of the "Q" where they have a less freight rate to pay.
Q. Now what effect does that have upon the territory in which you can sell, in and around Buffalo?
A. Very materially cuts down the radius of our freight rates.
Q. Do you feel the competition at Caspar?
A. Well, I can hardly say. That is new territory, and I don't live in Buffalo, but until this new oil strike came I don't think we did, but I imagine we will.
176 Q. And what will be the result of the blanket rate to Caspar upon an attempt to do business from Buffalo in that territory?
A. It will give them quite a little advantage on account of their lower delivered price at Caspar over what we have at Buffalo.
Mr. Campbell: I think that is all.

By Exam. Woodrow:

Q. Would it offset the 20 miles nearer that you are?
A. I am unable to say as to that, I don't think it will.
Q. You think regardless of their lower freight rate to Caspar that your position, being 20 miles nearer Kaycee, that you will still be able to compete on an equal basis?
A. No, I think not. I think you are a little mistaken in the distance. I think there is a difference of 15 miles. The oilfield is 75 miles from Caspar and 60 miles from Buffalo. The oilfield is about 10 miles south of Kaycee.

Cross-examination.

By Mr. Hagman:

Q. Have you been doing business around Kaycee and the oilfields?

A. Not in the oilfield.

Q. You do not maintain any yard at Kaycee?

A. No, sir.

Q. And what you say, then, about your inability to compete in there is your judgment as to what you will be able to do when
177 the road is finished into the oilfield; it is not based on any past experience?

A. No, because the oilfields are just new.

Q. What is the territory around Buffalo and Ucross that you claim has an advantage because of the blanket rate on the main line of the "Q"?

A. Well, all that line between those points and the main line of the railway, particularly as regards Ucross, that part of the country directly east—no, directly between that and the Burlington railroad where the town of Ulm is located. That is a distance of about six miles.

Exam. Woodrow: That would be north, wouldn't it?

Mr. Campbell: Would be northeast, I guess.

By Mr. Hagman:

Q. Well, it is the territory north of the Wyoming Railroad and south of the Burlington?

A. Yes.

Q. Somewhat of a "V" in there?

A. Yes.

Q. Now, as far as any business is concerned along that highway between Buffalo and Sheridan, your firm is not damaged in any way, or prejudiced in any way by the higher rate to Buffalo, because you supply customers from your Sheridan yard, isn't that true?

A. Have to supply some of them, yes.

Q. But it does not make any difference in your business
178 at the end of the year whether people buy from you at Sheridan or Buffalo?

A. Not if they come to us at Sheridan, but there are a good many other places at Sheridan to buy lumber from besides our yard, if they come there for their lumber.

Q. There are other places in Buffalo besides your yard?

A. One other, and there are lots of others in Sheridan, so that our chances of getting it are much less if they come to Sheridan.

Q. Now, you say it is how far from Ucross to Clearmont?

A. Ucross to Clearmont?

Q. 32 miles, did you say?

A. No, I think it is 10 miles.

Q. And do your customers at Ucross find it cheaper to buy from

you where the lumber has been hauled by rail to Ucross than to drive to Clearmont and buy it?

A. Some of them do and some do not; depends a good deal on the volume or on the quantity. If they just want a small amount they cannot afford to make the trip to Clearmont; if they want a wagon load they can ordinarily afford to go down there and haul it up cheaper than we can sell it to them at Ucross.

Q. Now, then, what is the difference in the price upon a thousand feet of lumber sold by your yard at Sheridan and at Buffalo?

179 A. Well, I cannot tell you exactly, but I would say approximately $5.00.

Q. Approximately $5.00?

A. Yes.

Q. Does that represent the difference in the additional freight you have to pay from Clearmont to Buffalo?

A. Part of it, part of the additional freight; does not take care of all the additional freight.

Q. So that this additional freight that you have to pay over the amount paid by Sheridan and other main line points is passed on to the consumer when you sell the lumber?

A. A portion of it.

Q. A portion of it?

A. Yes.

Q. But you are unable to say how much?

A. I am.

Q. The same thing is true at Ucross?

A. Yes, sir.

Q. I presume you and your concern want to see this Wyoming Railroad continue to operate into Buffalo and Ucross and you do not care to go back to the old days when you had to bring everything from the main line of the Burlington?

A. No, I don't think so.

Q. Do you think these towns like Sheridan have the right to have any better rate than a town like Buffalo, located on a branch

180 line in the interior?

A. I don't know that I have—I don't know.

Q. You think Buffalo should be put on the same basis as far as rates are concerned, as Sheridan?

A. Yes, sir.

Mr. Hagman: I think that is all.

Redirect examination.

By Mr. Campbell:

Q. Can you see any reason, Mr. Heilman, why Buffalo should not have the same rate as Sheridan, when Birds, Colorado, is given the same rate?

A. No, sir.

Q. And are you interested enough in the Wyoming Railroad that you care to continue paying an unreasonable and discriminatory

rate in order that a possibly poor railroad may exist off the people?
A. No, sir.

By Mr. Hagman:

Q. Well, now, you don't know anything about the town of Birds, and the Great Western Railroad, and how much their earnings have been, or their deficit, how much they have to charge, the competitive conditions down there and that sort of thing, do you?
A. No.
Q. You would hardly like to compare the situation with Birds unless you knew those things, would you?

181 A. Well, I don't know that it is necessary to compare that particularly, but any other town that is a good deal further away than Buffalo I can compare it with.

Q. What towns?
A. Any of the towns on the Burlington right south there that take the blanket rate.
Q. Mr. Campbell spoke of Birds because it is a town not located on the Burlington, but on another little railroad.

By Mr. Campbell:

Q. But it is a fact, is it not, that the Burlington and the other lines interested here do haul this freight many hundred miles for the same rate, and it surely must cost more to haul those many hundred miles for that rate than it would to haul it to Buffalo.

Exam. Woodrow: Many hundred miles what?
Mr. Campbell: Further than Clearmont. It must cost them a good deal more to haul those several hundred miles than it would this 25 miles to Buffalo.

A. That is the way it would appear to me.

Mr. Hagman: I object to this question for the reason that the witness has not qualified himself as a railroad man.
Mr. Campbell: It does not take a railroad man to pass on that kind of proposition. Any man in the world ought to be able to pass on that. That is self-evident.
Exam. Woodrow: It is not necessary to have argument of this character and the Examiner wishes you would develop the facts and leave the argument to appear in the proper place.

182 By Mr. Campbell:

Q. Deadwood, South Dakota, is not on the main line of the Burlington, is it?
A. I think not. I think it is on a little branch.
Q. And that is many miles further haul from Clearmont than Buffalo is?
A. Yes, sir.

Q. Mr. Heilman, can you make any statement as to the volume of business done by your company in Buffalo?

A. I can tell you the number of cars of freight received, of lumber and building material, at Buffalo, during the year 1919 and '20; up to the first of September we received 108 cars.

Q. Would a through rate no higher to Buffalo than to Clearmont increase the business, in your estimation, of the Wyoming Railroad?

A. Undoubtedly it would, yes, sir.

Mr. Griggs: One question. I think you stated in your examination that you would not care to pay an exorbitant rate to the Wyoming Railway Company even if it was necessary for the Wyoming Railway to cease business. Is that a correct statement?

A. Well, I believe that is about the way it was worded; I am not sure.

Q. If the Wyoming Railway Company were forced to cease business, what would your position be with reference to competi-
183 tive conditions in Buffalo? Would it be better or worse than at the present time?

A. Well, it might be a little worse. I expect it would.

Mr. Griggs: That is all.

By Exam. Woodrow:

Q. You have testified, sir, that you paid and bore the charges on shipments set forth in Exhibits "A," "B" and "C" attached to the complaint. Exhibit "A" deals with rates on brick and clay, and the shipments involved therein were intrastate shipments. You are seeking reparation on those shipments. The Examiner would like you to state upon what basis you desire reparation.

A. Mr. Examiner, I am not familiar enough with that point to answer you.

Mr. Campbell: Wasn't that covered by Mr. Brown's testimony?

Mr. Brown: I don't think we did cover the brick situation.

Exam. Woodrow: The Examiner is under the impression that nothing has been said as to the brick rate, and all the complainants' exhibits up to date have omitted reference to the brick rates.

Mr. Campbell: I think we will have to recall Mr. Brown, then, on the brick rates, in regard to reparation. We are not asking, of course, the Commission to fix a brick rate for the future, because they are all intrastate, but we are asking that reparation be paid on those brick shipments, but I think we will have to recall Mr.
184 Brown.

Exam. Woodrow: Any further questions of this witness?

Mr. Hagman: No, sir.

(Witness excused.)

R. S. BROWN was thereupon recalled, and having been previously sworn, testified further as follows:

Direct examination.

By Mr. Campbell:

Q. Mr. Brown, would your general testimony in regard to increase under General Order No. 28 be applicable to these brick rates?

A. Yes, sir, complainants' Exhibit No. 2, showing statement of revenue per ton mile and percentage of increase since June 24th. The complaint shows several cars of brick, but this statement only shown one shipment taken from that complaint, the statement in the complaint. Sheridan, Wyoming to Buffalo rate, based over Clearmont, the rate in effect June 25th, resulting from General Order 28, 17 cents; the factors of that rate are, 7 cents, Sheridan to Clearmont; 10 cents from Clearmont to Buffalo, making through rate of 17 cents. The rate in effect prior to June 24th was 13 cents; the factors of that 13 cent rate were 5 and 8; each factor was increased 2 cents. It is our contention that the correct reasonable rate would have been 15 cents, and we are asking for reparation of 2 cents per 100 pounds on all the brick shipments shown in the complaint.

185 By Exam. Woodrow:

Q. Well, what is the situation with respect to the fire clay shipments?

A. The rate structure is a little different, because they take class rate per hundred pounds.

Exam. Woodrow: What other shipment is that, the second shipment in Exhibit "A"?

A. Flue Linings. That is a clay product.

Q. With respect to those two shipments, fire clay and flue lining, the rate paid was 47½ cents. Now, on what basis do you request reparation be paid, in the event reparation is awarded by the Commission?

Mr. Campbell: We are simply asking on the brick, reparation on the basis of the single increase instead of the double increase.

Exam. Woodrow: The Examiner understands that, but this is just one more rate, and if he states what it would be, it will be clear.

A. I haven't got any of the rate memoranda or anything on those rates now. They were increased 25 per cent, being class rates. The flue lining and fire clay took the class rate to and from the junction point. Now, the situation would be the same in regard to reparation, that the class rates should be increased just once over the gateway, or over Clearmont. I can get those rates if you desire to know just what the factors are—I can get that later.

186 Q. The Examiner would like to have them in the record. It would be easier for the record to show that than for the Examiner to have a tariff memorandum when he gets back to the Commission.

A. I will give you that information.

Mr. Campbell: The rate is shown on the expense bill.

The Witness: On June 19th the factors on the fire clay, as charged, or in effect June 25th, were up to Clearmont, 22½ cents per 100 pounds; from Clearmont to Buffalo, 25 cents per hundred pounds. Those were the old factors, increased 25 per cent.

Mr. Campbell: I think you had better look this up later and file them with the Examiner. I think it would save time.

Exam. Woodrow: The Examiner will ask that those rates be filed. You can probably do it this afternoon—file them with Mr. Flannery and the record will be complete.

By Mr. Hagman:

Q. May I ask a question there: on the brick is there a commodity rate from Sheridan to Clearmont?

A. That is my understanding, commodity rate.

Q. And what is it on flue linings?

A. Class rate.

Q. There is a minimum class scale, is there not, fixed by the tariff?

A. Yes, sir.

Q. How does that minimum class scale compare with the
187 actual charge?

A. Why, as I remember, 22½ cents would be fourth class rate, and I believe that is higher than the minimum class scale. It is higher than the minimum class scale.

Mr. Hagman: That clears up the point I had in mind.

Mr. Campbell: That is all.

Exam. Woodrow: Complainant rests?

Mr. Campbell: Just a moment. I think that is all. Complainant rests.

Exam. Woodrow: Mr. Campbell, the Examiner notes that you have alleged violations of Sections 1, 2 and 3.

Mr. Campbell: We have introduced no evidence as to Section 2, but we will argue that the service up to Clearmont is contemporaneous, and that it is illegal to charge more per ton mile when destined to Buffalo for a haul from the point of origin and Clearmont, being contemporaneous service.

Exam. Woodrow: But you do not care to withdraw the allegation of violation of Section 2?

Mr. Campbell: No.

Exam. Woodrow: The Examiner wanted to call that fact to your attention, that you had not presented any testimony with regard to Section 2.

Mr. Campbell: The Evidence shows that the service is contemporaneous, coming into Clearmont over either one of the lines, or whichever one it comes over, and we will argue that it being
188 contemporaneous, there is a violation of Section 2, because the ton mile earnings are greater for that contemporaneous haul when destined to Buffalo than when destined to Clearmont.

Exam. Woodrow: Of course the Examiner has no comments to make as to the effect of that argument.

(Witness excused.)

C. N. BOLANDER was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Hagman:

Q. State your name.
A. C. N. Bolander, Chief Clerk to the Western Traffic Manager, Great Northern Railroad.
Q. How many years have you been engaged in freight or railroad work?
A. Thirteen.

Mr. Hagman: I think, Mr. Campbell; you will admit Mr. Bolander's qualifications?
Mr. Campbell: Certainly.

By Mr. Hagman:

Q. Mr. Bolander, I wish you would give us the history of the lumber and shingle rates from the Northwest into the Wyoming territory.
A. To commence with, I might say that the producing, lumber producing territory of the Pacific Northwest is divided into
189 several groups for the purpose of making rates to Wyoming territory. There are several different groups, but the principal ones are the Coast Group and the Spokane Group. The Coast Group is supposed to cover the most of the shipping points west of the Cascade Mountains, and the Spokane Group the shipping points within the Spokane District, or in the vicinity of Spokane.

Prior to November 1st, 1907, R. H. Countiss' Tariff S. R. 662, I. C. C. 564, provided the following rates from the Coast Group to Clearmont: shingles, 60 cents; cedar lumber, 50 cents; pine lumber, 50 cents; fir lumber, 45 cents. From the Spokane Group the same tariff provided a rate of 50 cents on shingles; 40 cents on cedar lumber, 40 cents on pine and fir.

Effective November 1st, 1907, this tariff was superseded by S. R. 963, I. C. C. 850, and the rates published effective that date from the Coast Group to Clearmont were: 60 cents on shingles; 60 cents on cedar lumber and 50 cents on both fir and pine. From the Spokane Group, 51½ cents on shingles, 50 cents on Cedar lumber and 45 cents on fir and pine.

There were a number of complaints made at the time this tariff was issued, and the entire tariff was before the Interstate Commerce Commission, and during June, 1908, they issued four orders in connection with cases 1054, 1327, 1329, 1335—no, five I guess,—and 1348. These cases are all reported in volume 14 of the Interstate

Commerce Commission Reports, and they required the car-
190 riers to establish, effective October 15, 1908, the following rates: 60 cents on shingles; 50 cents on cedar lumber, and 40 cents on fir and pine from the Coast Group; from the Spokane Group the rates were made 53 on shingles, 43 on cedar lumber and 33 on fir and pine.

These rates, with the exception of the shingle rates, remained in effect up until June 25, 1918.

Sometime between 1908 and 1918 the shingle rates were reduced to the cedar lumber basis. This made the rates in effect just prior to June 25, 1918, 50 cents on shingles, 50 cents on cedar lumber and 40 cents on fir and pine from the coast group, and 43 cents on shingles, 43 cents on cedar lumber and 33 cents on fir and pine from the Spokane group.

By Exam. Woodrow:

Q. That is to the points of destination involved in this case?

A. That is to Clearmont and such points as take the same rate. These rates of course went up 5 cents per 100 pounds on June 25, 1918, and they have since been advanced 25 per cent under Ex parte 74.

By Mr. Hagman:

Q. Now, Mr. Bolander, the rates which the complainants paid in this case on shipments which moved after General Order 28 became effective, and before Ex parte 74 increase, were the rates established by the Interstate Commerce Commission in these five cases you mentioned?

A. Yes, sir.

191 Q. Increased under General Order 28?

A. Yes, sir.

Q. Now, I wish you would state—first, this rate as established, was blanketed at both ends, was it not?

A. Yes, to a considerable extent.

Q. As established after the five decisions of the Interstate Commerce Commission?

A. Yes. It was blanketed prior to their decisions and after their decisions.

Q. And those blankets have been maintained since that time?

A. Since that time.

By Exam. Woodrow:

Q. Those rates were increased by General Order No. 28 five cents?

A. Yes, sir.

By Mr. Hagman:

Q. I wish you would just give us a general idea as to the extent of the blanket on the west end and also on the Wyoming,—Colorado—Nebraska end.

A. The Coast Group rate territory includes the territory from Vancouver, British Columbia south to—I don't know just how far south of Portland—a distance of approximately 350 or 400 miles, and east and west it extends from practically the Pacific Ocean to, with a few exceptions where arbitraries are carried, to the Cascade Mountains; and the territory immediately east of the Cascade Mountains is on a basis that is lower than the Coast Group rate and a little higher than the Spokane Group rate. With respect to the Great
192 Northern, this intermediate territory includes Leavenworth and other points in that vicinity; and the Spokane rate group includes from Spokane and certain stations north and east thereof. The originating points on the other lines are of course in the same territory, the same general territory.

With respect to the destination points the blanket extends down south I think as far as Denver and Alliance, covers a considerable territory on the C. B. & Q. south of Billings.

Q. Now, just for example, on June 25th, what was the lumber rate from the Spokane territory to Billings?

A. I haven't got it here, but I think it was about a cent or two lower than——

Q. I wish you would check it and see if it was 37 cents.

A. Well, the rate via the Great Northern was 38 cents, but I believe the Northern Pacific was a cent or two lower. Then the Short Line I think have a lower rate than the Great Northern.

Q. That is, to Billings?

A. To Billings; but it is not over two or three cents difference in the rates.

Q. Well, what is the Great Northern Rate, then, to a point on the "Q" just south of Billings?

A. That would be 38 cents.

Q. The same as to Billings?

A. Yes, via the Great Northern.

193 Q. Well, this blanket that existed then, on the eastern end has been maintained since it was established after these decisions of the Interstate Commerce Commission?

A. Yes, it has been continued continuously since the rates were established by the Interstate Commerce Commission in 1908.

Q. Now, what have you to say as to whether the rate you have testified to up to Billings and also up to Clearmont is a reasonable rate?

A. I think the Interstate Commerce Commission found that the rates to those points were reasonable when they rendered their decisions. I have one statement prepared here showing rates from various points in the Pacific Northwest to distances corresponding with distances over which some of the shipments to Buffalo moved. I took the distances from points of origin on the Great Northern Railway. There were shipments moved from Libby, Bonners Ferry, Priest River and Albany Falls, on the Great Northern. I took the distances from those points to Clearmont and compared them with rates to other points on the Great Northern in North Dakota and Montana corresponding to the distances to Clearmont.

Q. The statement which you have just referred to is the Exhibit which we have marked "Defendants' Exhibit No. 1" for identification?

A. Yes.

194 Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked "Defendants' Exhibit No. 1, Witness Bolander," and is forwarded herewith.)

By Mr. Hagman:

Q. Just continue, Mr. Bolander. Do you have some comments to make upon this exhibit?

A. I might say in connection with the rates shown in the second section, that is, the rate from Libby, Montana, to Mondak, Montana, a distance of 659 miles, the rate as shown there on fir and pine lumber is 35 cents for 659 miles, or as compared with rate of 38 cents on fir or pine lumber from Libby to Clearmont, Wyoming, a distance of 784 miles. The local Montana rates including the rate from Libby to Mondak, are the result of rates which were ordered by the Railway Commission of Montana, and appear quite favorable with the rate to Clearmont, which was ordered by the Interstate Commerce Commission. It was during 1913 that the Montana Commission set the rates from the lumber district in Northwestern Montana to practically all stations in the State.

Q. Have you anything further on the subject of the reasonableness of the rate up to Billings and Clearmont?

A. I might call attention to the first item in the third section of the statement—well, the second item: the rate from Seattle, Washington to Concord, Montana, is 40 cents, for a distance of
195 783 miles, on fir and pine, as compared with 38 cents, rate for 784 miles, Libby to Clearmont.

Q. Can you explain the reason for blanketing that rate south of Billings?

A. I believe another witness will testify further in connection with the blanket, but of course I think it is admitted by all railroad employees that have anything to do with the making of lumber rates, that the favorable rate is influenced somewhat by California competition, on account of the distance being so much shorter.

By Exam. Woodrow:

Q. Are the rates from Montana blanketed? Concord is in Montana, the point that you referred to?

A. It is, yes, sir.

Q. Montana rates, then, are not blanketed?

A. Well, no, the rates are on a grade until you get to the eastern part of the State, or in North Dakota, when there is a considerable blanket until you get to St. Paul. That has influenced to a certain extent the rates in that territory by competitive conditions, different routes.

Q. This Exhibit compares blanket rate to Clearmont with the graded rates from Montana?

A. Yes.

Q. Proceed.

Mr. Hagman: I have here an extract from the testimony of Mr. Hastings in the Wilbur Lumber Company Case, I. C. C.
196 Docket 11224, which I am offering in evidence.

Mr. Campbell, do you consent that this testimony may go in and have the same force and effect as though Mr. Hastings were here personally?

Mr. Campbell: It is the same testimony as offered yesterday?

Mr. Hagman: Yes, subject to your right to object to the relevancy or the competency.

Mr. Campbell: I would like to have objection entered now as to its being incompetent, irrelevant and immaterial.

Exam. Woodrow: It will be received.

Mr. Hagman: This relates to the interpretation of General Order No. 28.

Exam. Woodrow: It will be designated Defendants' Exhibit No. 2.

(The testimony was received in evidence, thereupon marked "Defendants' Exhibit No. 2, Witness Bolander," and is forwarded herewith.)

By Mr. Hagman:

Q. For the purpose of making this record complete with reference to the complaint against the double increase I wish you would repeat what you said yesterday with reference to the receipt of Rate Authority No. 10, and so forth.

Mr. Campbell: Might save time if we asked the Stenographer to copy from the other record what he stated yesterday. I would be willing that that should be done if the Examiner would.
197 Mr. Hagman: That is satisfactory to me.

Exam. Woodrow: It is not very long and there might be some question. The Commission does not like to stipulate from one record to the other.

A. About the date of receipt, et cetera?

By Mr. Hagman:

Q. Yes.

A. I believe it was stated by some of the complainant's witnesses that this freight rate authority was issued on July 2nd, but the copy that was received in Western Traffic Manager's office of the Great Northern Railway is dated at Chicago, July 26, 1918, and was received on July 30th, and I believe I also stated that there was considerable time consumed in issuing tariffs that would properly take care of the changes that were required in this Freight Rate Authority 10. We construed the original Order No. 28 as having the effect of increasing each factor where combination rates were applied on

any shipment and the charges were collected on that basis until tariffs were amended, and Mr. Kelly's Tariff 228 was issued sometime afterwards.

Q. Have you an extract of Mr. Hastings' testimony which has been put in evidence in this case?

A. Yes, sir.

Q. Was there any joint through rate from the Northwest to
198 Buffalo over any other railroad existing at the same time the complainants paid this combination of locals?

A. There was no joint through rate to Buffalo from the Northwest at all via any route.

Q. The defendants in this case have taken the position that they are unwilling to extend that blanket to Buffalo. Now, I wish you would state the reasons for that.

A. It has not been the policy of the transcontinental carriers for a number of years to extend their transcontinental lumber rates to and from short lines unless forced to do so by competitive conditions. I guess Mr. Mount testified in another case yesterday, calling attention to the fact that there are now several other cases before the Commission in which short line carriers or mills located on short lines are endeavoring to obtain the establishment of joint rates by making the trunk line absorb such charge as the short line would make up to the junction.

There was considerable testimony given yesterday afternoon by Mr. Brown with respect to the joint rates carried on lumber to Birds, Colorado, a point located on the Great Western Railway, and according to his blueprint, Exhibit No. 3, the Great Western Railway is shown as being a short line extending from Loveland to Birds.

In order that there may be no misunderstanding on the part of the Examiner, I would like to say that the Great Western
199 Railway extends from Longmont, Colorado, to Eaton, Colorado. Longmont, the station on one end of the line, is served by the C. B. & Q., while Eaton, a station on the other end of the line, is served by the Union Pacific System. As a consequence, if there were no joint through rates, the C. B. & Q. would be unable to handle any business going to stations in the vicinity of Eaton and the Union Pacific would be unable to handle any traffic in to stations in the vicinity of Longmont.

By Exam. Woodrow:

Q. Will you point those points out to the Examiner on this map?

A. I think I can. (Witness conferring with Examiner). Here is Longmont (indicating).

Q. South of Birds?

A. Yes, on the C. B. & Q. Here is Eaton. This line here (indicating) is the Union Pacific; comes down from their main line through Cheyenne.

Q. Make that so the record will show where Eaton is. Windsor and Eaton are in a Northeasterly direction from Birds, is that correct?

A. Yes, sir.
Q. Proceed.

By Mr. Hagman:

Q. I understand the point you make is that since the Union Pacific maintains a joint rate into Birds, on the Great Western, it is necessary for the C. B. & Q. and the other routes to maintain
200 the same rate to get a line haul on this business?

A. No, I would not put it that way, no, but when we have a short line connecting with two trunk lines, and the connections with the trunk lines are on each end of the short line, why, in order that both of the trunk lines may be on equality at all of the stations on the short line, it is necessary to blanket the entire line, and the carriers are forced to absorb a considerable revenue that they do not like to do.

Q. Do you think the situation at Birds, on the Great Western Railway is similar to Buffalo on the Wyoming Railway?

A. It is not similar in any way, because the Wyoming Railroad is not served by—does not connect with any carrier other than the Chicago, Burlington and Quincy.

Q. Do you think that, in determining whether or not it is reasonable to extend that blanket rate, any factor besides distance should be taken into consideration?

A. Yes, sir, competitive conditions are a very large factor in the making of rates.

Q. Can that blanket rate be extended 28½ miles on the Wyoming Railway for the same reasons that it would be extended 28½ miles on the Burlington Railroad?

A. No, it could not.

Q. For what reason?

A. Well, because it does not look reasonable that the Wyoming Railroad could afford to handle traffic for 28 miles on their
201 line for the same charge as the Burlington would handle it on their main line, where they are handling a great deal more business than the Wyoming Railroad can handle. Another reason would be that if the rate were extended for 28 miles on the Burlington they would get the entire revenue, whereas when you have to split it between two or more lines, each one has to get more than the total through charge—that is, each one would have to get a greater per ton mile earning, and that is at an additional expense.

Q. Does the fact that a two-line haul would result have anything to do with it?

A. It is generally customary to make higher rates on two-line hauls than on one-line hauls unless there are peculiar conditions which force rates on a different basis.

Q. In your opinion as a traffic man, do you consider that the present rate maintained to Clearmont is in and of itself a reasonable rate?

A. I believe it is.

Mr. Hagman: I believe that is all.

The Witness: I would like to make a further statement, if you do not mind. There was considerable testimony given yesterday afternoon by Mr. Brown with respect to this blanket territory extending from Billings to Denver, Edgemont, Deadwood and Loveland, and in case the Examiner should get the impression that all of this territory takes this blanket rate, I would like to refer him to
202 rates which were in effect immediately after June 25, 1918 to Lander, Wyoming, a point in Wyoming on the Northwestern Railroad. The Coast group rates to Lander are 65 cents on shingles, 65 cents on cedar lumber and 55 cents on pine and fir. The Spokane rates are 58 cents on shingles and cedar lumber and 48 cents cents on fir. Tariff reference for the rates given is R. H. Countiss' Tariff No. 18-C, I. C. C. No. 1058. What is true of the rates to Lander is also true as to various other points in Wyoming and Western Nebraska, which take rates higher than this blanket rate which has been referred to.

Exam. Woodrow: And a similar complaint might be brought with respect to traffic at Lander, as this complaint?

A. The distance is a little further to Lander than it is to Buffalo, but it certainly cannot be as far as the distance to some of the points which were referred to yesterday.

Cross-examination.

By Mr. Campbell:

Q. Mr. Bolander, I understood you to say that you thought the rate from Libby, Montana, to Clearmont was a reasonable rate in and of itself?

A. I think so.

Q. What elements do you take into consideration in determining that this rate is a reasonable rate in and of itself?

A. A great many things to take into consideration. I think the rate from Clearmont from Libby would even be higher than it is today, were it not for the situation at Denver and points in
203 that vicinity which requires a large blanket, and they would be graded up somewhat similar to the rates to Montana destinations.

Q. Was this one of the rates fixed by the Commission?

A. Yes, sir.

Q. Then you determine that because it was fixed by the Commission it was a reasonable rate?

A. Well, the carriers wanted to get rates that were materially higher than that rate, and they considered that they were reasonable at the time they were established, and this if anything, was less than reasonable.

Q. Less than reasonable?

A. Less than reasonable.

Q. Now, in the movement from Libby to Clearmont that goes over how many lines?

A. Libby to Clearmont goes over two lines.

Q. Doesn't it go over the Northern Pcific from Laurel to Billings?
A. We deliver freight traffic direct to the C. B. & Q. I cannot testify as to whether we operate over tracks that might be owned by the Northern Pacific.
Q. Now, what is the distance from Libby to Billings? It is shown as 784.2 miles, is it not?
A. Libby to Clearmont is 784 miles.
204 Q. I meant Clearmont—did I say Billings?
A. Yes.
Q. I mean Clearmont. What proportion of that distance is over the Great Northern Railroad?
A. The distance from Libby to Billings is 602.9; from Billings to Clearmont is 181.3.
Q. Now, what proportion of that rate does the Great Northern get?
A. I do not recall. I did not look up the divisions.
Q. So you do not know, then, what per ton mile earnings the Great Northern gets upon that traffic?
A. This statement shows the per ton mile earnings of the two lines jointly.
Q. But does not for the Great Northern?
A. No, sir.
Q. Now, then, the rate from Libby of 38 cents (which is now 47½) is blanketed to Birds, Colorado, is it not?
A. It is. No, I beg pardon—some of those points that were testified to yesterdayI note that they were blanketed from the Coast, but there are some of them that take a higher rate from the Spokane territory—Spearfish and Deadwood.
Q. But they take two cents higher, and this rate is blanketed to Birds, Colorado.

Exam. Woodrow: Let the record show whether you are speaking about the present rate or the rate subsequent to June 25th,
205 47½ cents.
Mr. Campbell: 47½ cents, as effective now, since August 25th. 38 cents was the rate in effect on August 25, 1920, but before that, before August 26th, they were blanketed also to Birds, Colorado?
A. I assume so, the tariff will show.

By Mr. Campbell:

Q. Now, if you had taken the haul from Libby to Birds, Colorado, your per ton mile earnings would have been how much?
A. It would have been less than to Clearmont.
Q. Very much less, would it not?
A. It would be some—it would be more if you take a point north of Clearmont.
Q. I am taking the rates you have taken, Libby to Clearmont. Now, that rate is blanketed to Birds, Colorado, and if you had used that mileage you would have had a very low ton mile earning, would you not?

A. It would have been lower than to Clearmont.

Q. Now, then, what would you say as to the reasonableness of that rate?

A. Of the rate from Libby to Birds, Colorado?

Q. Is it or is it not reasonable in and of itself?

A. I consider that it is not reasonable in and of itself, on account of its being lower than normal, due to the competitive situation.

206 Q. Now, the haul from Libby to Birds, Colorado, goes over the Great Northern, the C. B. & Q and the Great Western Railway—three lines, does it not?

A. Yes, sir.

Q. What are the divisions of the Great Northern Railway of that rate?

A. What are the divisions? You mean the divisions that are allowed the Great Western Railway?

Q. No, the Great Northern.

A. I don't understand your question.

Q. How much of that rate does the Great Northern get, how much does the C. B. & Q. get and how much does the Great Western get?

A. I don't know what the divisions are.

Mr. Campbell: I would like to ask that those be supplied; also that the divisions between the Northern Pacific and the C. B. & Q. to Clearmont, Spearfish and Deadwood and to Edgemont, so that a similar computation as to the reasonableness of these rates can be made.

Exam. Woodrow: Any objection to filing those divisions with the Commission?

Mr. Hagman: I don't think it is material. The question is here, What is a reasonable through rate. What the divisions may be between carriers cannot have any bearing on the question, so we object to furnishing this statement or to any further questions along

207 that line.

Mr. Campbell: This is a blanket territory, and that traffic also goes over the same lines.

Exam. Woodrow: The Examiner will have to confess that he does not see the pertinency of this line of questioning. The fact that it is a blanketed territory would show that the divisions would not be of value without you had the average division to the blanket and the average earnings obtained by each carrier for an average haul in the blanket and to request that the defendants furnish such an exhibit would entail a great deal of work, and the Examiner would prefer that you withdraw your request.

Mr. Campbell: I will not withdraw the request, for this reason; not only in this case, but in every other case these railroads come in and make assertions that rates are or not reasonable in and of themselves. They are not required to anlayze a rate. Now, this witness has brought forth here an exhibit in which he claims that an earning of $.0121 per ton mile is a reasonable rate in and of it-

self, when the testimony shows that that very rate is carried volunarily by them some 600 miles further. Now, either one of two things is true—either one of those rates is reasonable and the other is unreasonable, and if that unreasonable rate is maintained, it is casting a burden upon other traffic, and I think that the time has come in these rate matters when these carriers must show
208 what a reasonable rate is. Especially is that true as the law now stands. It is a different proposition now, because the Commission now has a right to fix a minimum rate, and they have the right in these cases to say that if this rate to Birds, Colorado is less than reasonable, that this carrier must cease maintaining that rate. And I say that now it is pertinent here because the Great Northern, the C. B. & Q. and Great Western—three lines—have a joint rate no higher than to Clearmont although the distance is several hundred miles further and then they object to extending that rate 25 miles on the ground of reasonableness. I think it is very pertinent.

Mr. Hagman: May I ask one or two questions of Mr. Bolander before I say anything further on this? I think it may be of some assistance.

Exam. Woodrow: You may.

By Mr. Hagman:

Q. I understood you to say, Mr. Bolander, that you thought the rate to Birds, Colorado, was in and of itself a less than reasonable rate, is that correct?

A. Yes, sir.

Q. Did you mean by that it was unreasonable under all the competitive and other conditions that exist for these railroad companies to maintain such a joint rate to Birds?

A. Maybe the word unreasonable was not properly used. I should perhaps describe it as abnormal or a sub-normal rate. It is lower than it would be were there no competitive conditions to make
209 the present rate necessary.

Q. Now, in view of the record here the way it stands, I want to renew my objection, for this reason: the complainant is asking for a joint through rate to Buffalo which shall be reasonable. That is the only question here involved, and what the divisions in any of these joint rates may be, is a matter strictly between the carriers themselves, and has no bearing on what a reasonable joint rate would be, and I think the Commission has so held.

Exam. Woodrow: It appears to the Examiner that complainants' objections are of such a general character that they go to the objection to any blanket rate

Mr. Campbell: No, it goes to this: here is a general blanket territory; here is a discriminatory rate, as we claim, maintained in that general blanket territory. Now, then, I think if the evidence were produced that you would find that these carriers could give to the Wyoming Railroad the entire amount of their local and still earn more money on that traffic to Buffalo than they now earn to Birds, Colorado.

Mr. Hagman: After we hear from the Wyoming Railroad, I think you will retract that statement.

Mr. Campbell: The Wyoming Railroad come in here and say that they have requested the joint rate.

Mr. Hagman: There is an explanation for that, too.

Mr. Campbell: And I assume that your answer means
210 what it says, that they would like to have a joint through rate.

Exam. Woodrow: The Examiner regrets that complainant is still insisting upon this information being furnished, but in view of the labor involved in compiling a statement of that character that would really be of value, he will have to rule that it will not be necessary to furnish that statement.

Mr. Campbell: There could not be much labor involved. All I ask for is the division on the rate from Libby to Clearmont between the Great Northern and the C. B. & Q.; the division between the Great Northern, the C. B. & Q. and the Great Western from Libby to Birds, Colorado. Now, there is no labor about that. I haven't any doubt that Mr. Bolander could tell that in three minutes' time if he was in his office—the Colorado & Southern; there are four lines there; I thought there were but three, but from Libby it would pass over the Great Northern to Laurel, the C. B. & Q. would take it to Wendover, and the Colorado & Southern to Loveland, and beyond the Great Western from Loveland to Birds.

Exam. Woodrow: What good would that information do you, Mr. Campbell, if the Commission would decide that the Clearmont rate should be extended to Buffalo?

Mr. Campbell: None at all. It would not do me any good. I think it would aid the Commission very much in arriving at that, and then the Commission has held this too, that if the Wyoming Railroad, the C. B. & Q., the Great Northern and Northern
211 Pacific cannot agree upon divisions, that they may then fix the divisions. Now, that is the law as it now stands, and I think these divisions would be very helpful for that purpose, because the chances are they will not agree. That is undoubtedly the reason why there has not been a through rate up to the present time.

Mr. Hagman: That is the only time the question of divisions is material, is when the carriers ask the Commission to fix them.

Exam. Woodrow: Since the carriers still object to furnishing this information, and since the Examiner fails to see the pertinency of it, he will have to rule that this information will not be required to be furnished.

By Mr. Campbell:

Q. Mr. Bolander, this Coast rate, which is shown by the Exhibits of the Complainants, as from Seattle, is blanketed, and extends from Bellingham, does it not?

A. I think it goes to Vancouver, British Columbia.

Q. Yes, and that rate from Vancouver is blanketed to Birds, Colorado?

A. Yes.

Q. Now, is that rate reasonable in and of itself or unreasonable?

A. Well, the same situation prevails with respect to the rates from the Coast group as applies from the Spokane group.

212 Q. So that in your Exhibit you have taken a distance which corresponds with the distance in this complaint, for comparison only, and you have omitted the long distances in those blankets, isn't that true?

A. No. I simply obtained the distances from the points covered by the complaint, and then I took those exact points and made my second set of comparisons. Then I thought, just as a little further explanation, I would take a representative point in the Coast group, and Seattle was the largest point that I thought of, and I put it in, but I could have picked a more easterly point; I could have picked a more distant point.

Q. Your Exhibit, then, to be of value to this Commission, would have to show an average of all the distances in the blanket territory, wouldn't it?

A. It is just to show that the rate from Libby, Bonners Ferry, Priest River and Albany Falls to Clearmont is not unreasonably high as compared with other rates provided in the tariffs. I could find a good many more rates higher, and I presume I could find rates that were lower.

Q. But if it was compared with the more distant points in these blankets, both of origin and destination, it would appear to be unreasonable by that comparison, would it not?

A. If I had picked a more easterly point the comparison would have been more favorable.

213 Mr. Hagman: Do you contend that your rate to Birds should be graded back to Clearmont?

Mr. Campbell: I am not contending that, no, sir; I am contending that in this general blanket Buffalo should be included.

By Mr. Campbell:

Q. Now, in this decision of the commission on lumber rates, the rates were fixed as reasonable from certain points to certain other points?

A. I believe the originating groups were designated in one of the opinions.

Q. But the destination groups were not?

A. Well, it is very evident from the figures, from the rates which I read to Clearmont, that the rates were ordered by the Commission because of the tariff which became effective on November 1, 1907, provided from the Coast, rates of 60 cents on shingles and cedar lumber, and 50 cents on fir lumber. After these orders came out, as a result of those orders and in compliance with the orders, we were obliged to make the rates 50 cents on cedar lumber and 40 cents on fir and pine, being as it was a ten cent reduction from the rates which we had attempted to establish.

Q. But the blanket feature was very largely a matter voluntarily carried out by the carriers, was it not?

A. The blanket applied prior to the hearings.

214 Q. The blanket was not ordered by the Commission?
A. Well, in a way it was, and in a way it was not. The Commission did not specifically say "Here is Birds, Colorado, and here is Billings, Montana; publish a rate of so and so to all stations between those points." But they said that you have to restore the rates that have been in effect prior to the increase.
Q. And prior to that decision this territory in controversy was pretty generally a blanket territory, was it not?

Exam. Woodrow: The territory of destination?
Mr. Campbell: Yes.
A. Yes.

By Mr. Campbell:

Q. And you carried out after the decision of the Commission, this order by maintaining and keeping that general blanket territory?
A. Yes, sir.

Mr. Campbell: I think that is all.
Exam. Woodrow: Any further questions, Mr. Hagman, of Mr. Bolander?
Mr. Hagman: No.

(Witness excused.)

L. R. CAPRON was thereupon called as a witness, and having been duly sworn, testified as follows:

215 Direct examination.

By Mr. Hagman:

Q. State your name, please.
A. L. R. Capron, Assistant General Freight Agent, Northern Pacific Railway.
Q. How many years' experience have you had in traffic matters?
A. Seventeen.
Q. I think you have some explanation that you would like to make with reference to the reasons for blanketing the rates just referred to by Mr. Campbell is his questions.
A. Yes. An examination of the transcontinental lumber tariffs involved in this proceeding will show that while there is a great deal of blanketing, that blanket is not general. Down through Kansas, Nebraska, Oklahoma,—lots of that territory,—you will find the rates graded. This so-called blanketing is largely, if not almost wholly the result of the long lines meeting short line competition. Testimony has already been given here to the effect that this blanket we have just been speaking of, is the result of the C. B. & Q. and the Northern Pacific meeting the rates at Denver fixed by the Harriman Lines. The same proposition at the Missouri River; St. Paul lines making rates through the lower Missouri River gateways up to the

northern territory; not always exactly the same rate, but they were compelled to lower their rate in order to compete to some extent. Not wishing to grade back, they blanketed those rates.

As I said before, the blanketing, while in a sense voluntary,
216 was, as a matter of fact, the original result of competition between carriers, and not because there was any general theory adopted of blanketing these lumber rates at points of destination.

Q. Do you believe, Mr. Capron, that the blanketing of that rate into Birds, on the Great Western Railway, is a reason for blanketing the rate into Buffalo, on the Wyoming Railroad?

A. I do not know anything about the situation at either Birds or Buffalo, but from testimony that I have heard here, I should say not.

Q. Because of the difference in the competitive situation, or what?

A. Yes. As it has been described here, the application of that rate at Birds is the result of the C. B. & Q., in connection with the Great Western Railway, meeting a rate of the Union Pacific from a point just beyond on the Great Western Road, and of course they would have to apply that at intermediate points.

Q. Would the rate required——

A. I want to emphasize again that in that respect I am just speaking from what I have heard in this testimony.

Q. Now, as a traffic man, I want to ask you this question: would a rate necessarily required by the short line be a factor in determining whether or not you could extend that blanket to points on the short line?

217 A. Certainly is a factor.

Q. So that without knowing what rate the Wyoming Railway company needs, and what rate the Great Western needs, could one compare those two situations, as to whether or not the blanket should be extended?

A. Well, aside from the question of their individual needs, I don't think the thing can be compared.

Q. My question is, has that any bearing on the solution of the question, their individual needs?

A. My personal opinion is that it has not.

Q. For instance, if the evidence showed that the Wyoming Railroad actually required a 20 cent rate on lumber for 28 miles, because of their operating conditions and other conditions, and the Great Western was more prosperous and favorably situated, and required only half that amount would that have any bearing on the question?

A. It might have some bearing on the question of what arbitrary you would add to the main line rate, if both roads were similarly situated; it would not be determinative in any way whether or not the blanket rate should be extended.

Q. In one case the Burlington would take considerably less than they would in the other?

A. If they were forced, yes.

Q. Is there any limit as to the amount that a main line can shrink its revenue in order to establish a joint rate?

218 A. The answer to that is obvious.

Mr. Hagman: That is all:

Cross-examination.

By Mr. Campbell: .

Q. You claim the right of carriers to blanket rates even to the point of going below a reasonable rate, to meet competitive conditions, rail competitive conditions?

A. Yes, sir, providing that they do not accept an unremunerative rate.

Q. And you maintain that that is true now under the present law as it stands, the same as at or prior to the Esch-Cummins Bill?

A. Yes, sir.

Mr. Hagman: I object to Mr. Campbell arguing law points with the witness.

Mr. Campbell: He has qualified himself as an expert.

Mr. Hagman: Not as a lawyer.

The Witness: I did not qualify myself as an expert. I said I had seventeen years' experience.

Mr. Campbell: I think you are right when you say you did not qualify as an expert. I don't think there is any such animal. Now, Mr. Capron, you say that this territory is not a general blanket territory. Can you name any points between Spokane and Edgmont and Laurel and Loveland that are not blanketed?

219 A. I did not say that it was not today a general blanket territory. Now, I think that is as far as I could go. If you read over what I said I think it will be clear to you. I was explaining how the blanket had resulted.

Q. You do not claim, then, that this territory in controversy is not a general blanket territory?

A. No, sir, I simply claim that if it is a blanket territory it is the result of these lines meeting a rate at Denver which was fixed by another system.

Q. Now, what competitive conditions are there at Deadwood and Spearfish, South Dakota, that would require the blanketing of the Clearmont rate at those points?

A. I will ask the witness for the C. B. & Q. who appears, to answer that question.

Q. Are there any other lines, do you know, reaching those points but the C. B. & Q.?

A. I think those points are in the Black Hills District, and other lines reach the Black Hills.

Mr. Campbell: I think that is all.

Exam. Woodrow: Any further questions?

Mr. Hagman: That is all.

(Witness excused.)

Exam. Woodrow: Mr. Hagman, proceed with your next witness.

G. A. HOFFELDER was thereupon called as a witness, and
220 having been duly sworn, testified as follows:

Direct examination.

By Mr. Hagman:

Q. State your name, please.
A. My name is G. A. Hoffelder.
Q. You are employed by the C. B. & Q. Railroad Company at Chicago?
A. Yes, sir.
Q. Representing the Traffic Department?
A. I am Chief Clerk for what we term the Commerce Department of the Burlington.
Q. Please state very briefly what experience you have had.
A. I have been connected with the Burlington for fourteen years in various capacities, all in the Traffic Department.

Mr. Campbell: We do not need to take up time. We will admit his qualifications.

By Mr. Hagman:

Q. All right. Reparation is asked in this complaint on shipments of brick from Sheridan to Buffalo, I believe?
A. Yes. In connection with that I want to present a little exhibit here, in substantiation of the rates that were charged from Sheridan and Clearmont on the brick.

(The statement was received in evidence, thereupon marked "Defendants' Exhibit No. 3, Witness Hoffelder," and is forwarded herewith.)

The Witness: You will note that the distance from Sheri-
221 dan, Wyoming, to Clearmont, Wyoming is 38 miles. In this exhibit I have shown, as compared with the seven cent rate charged from Sheridan to Clearmont, rates on brick as from Sheridan to other points on the same line in Wyoming and Montana, ranging in distance from 5 to 28 miles. It will be noted that the seven cent rate to Clearmont is not out of line with the rates applicable to other points.

I have also shown in the same exhibit, rates from Lovell and Worland, Wyoming, which points are located on what is called our Bighorn Basin Line, that lies west of the Sheridan Division.

Q. Before you go any further, I wish you would state what rate you are speaking of now, that is, the rate applicable at what time?
A. These are the rates that became effective June 25, 1918, and I show the rate of seven cents from Sheridan to Clearmont, which was charged on the brick, and the rates that I compare with the seven cent rate were rates that were contemporaneously in effect. This statement does not show the Ex parte 74 increases.

Now, from Lovell and Worland I have shown rates to stations in Wyoming ranging in distance from three to fifty-four miles, and again it will be noted that the rate from Sheridan to Clearmont is not out of line with those applying from Lovell and Worland.

I also show the rate that was applicable from Billings to
222 Hardin, Montana, a distance of 58 miles, to which point the rate was eight cents, or one cent higher than that to Clearmont.

I want to state that in my mind these comparisons prove conclusively that the seven cent rate, Sheridan to Clearmont, was not an unreasonably high rate.

That is all I have to say about the brick situation.

Q. Now, I believe you had something that you wanted to say with reference to the reasons for extending that blanket rate to Birds, on the Great Western?

A. In the first place, I could not just "dope out" in my own mind why he picked Birds. There is nothing ever moves there. It is a prepaid station. But nevertheless there is a great reason why we have that rate blanketed to the Great Western Railway point. Now, Mr. Bolander has said to you about all I wanted to say, so I won't repeat it, but I want to elaborate a little bit on his testimony.

The Great Western Railway is not a straight line, running from Longmont or Loveland to Birds, as contemplated on the complainants' Exhibit No. 3. In reality the road operates 86 miles of track, and it has two connections with the Union Pacific, one at Eaton and the other at Kelim. It also has two connections with the Colorado & Southern, one at Loveland and one at Windsor. Then it has connection with the C. B. & Q. at Longmont.

Now, the rate from Denver, of course, as has been said, was
223 made by the Union Pacific in the Northwestern Lumber Cases. That was in 1908. At that time the C. B. & Q. Line, what we call our Bighorn Basin Line, was not built. It was only built down as far as Thermopolis, and we built it from Thermopolis down to Wendover, where we connect with the Colorado & Southern, I think we finished that line in 1915. So at that time, or before 1915, we did not have that Bighorn Basin Line. Consequently, for us to compete at Denver with the Union Pacific, and in that prosperous territory around Denver, we had to haul it over our so-called Sheridan Division, which made the movement down to Alliance and into Denver, that way, instead of via our Casper division, and the Colorado & Southern via Wendover. Therefore we had to extend the blanket rate of 38 cents from Spokane, which in reality is the Denver rate fixed by the Commission—we had to extend that along that Sheridan Division Line. That created a Fourth Section Violation. Now, talking about this Great Western Railway as a matter of competition which forced us to extend the blanket rate on the Great Western Railway, that actually did not exist at Buffalo.

By Exam. Woodrow:

Q. And that rate was extended before you completed the Wendover Line?

A. Oh, yes, yes. Now, Loveland, Colorado is intermediate to Denver on The Colorado & Southern Railroad. Birds is intermediate to Loveland on the Great Western. Consequently we could not very well carry anything higher at Birds than applicable at Love-
224 land, and in addition, the Great Western Railroad has connection with the Union Pacific at Eaton, and the Colorado & Southern, which intersects them at various points.

This situation is entirely different than that obtaining with the Wyoming Railway.

That is about all I have to say, Mr. Hagman.

Mr. Hagman: Have you any questions, Mr. Campbell?

Cross-examination.

By Mr. Campbell:

Q. Did I understand you to say that rate was fixed as a reasonable rate from Spokane to Denver, of 38 cents?

A. No, I possibly gave that impression. I meant to say that the rate from the Coast was fixed—I will correct that statement and say that the Coast rate to Denver was fixed at 40 cents by the Harriman lines. Then the Spokane rates were made a differential of seven cents under.

Q. Was that established by the Commission as a reasonable rate?

A. It is my understanding it was.

Q. Now, then, if that is a reasonable rate, then all of these intermediate points have got the same rate, not because the rate to the intermediate points was reasonable, but in order to avoid Fourth Section violation, is that right?

A. They could not very well charge more intermediate.

Q. No, but if the rate to Denver is reasonable doesn't it
225 follow that the rate to intermediate points is unreasonable in and of itself?

A. Not altogether. I would not say that, Mr. Campbell.

Q. Now, what competitive conditions are there at Wendover which would require you to establish the Clearmont rate at Wendover, other than fourth Section violations? Are there any?

A. Well, I don't know of anything other than Fourth Section violation.

Q. Then what competitive conditions, other than Fourth Section violation, are there at Edgmont which would require you to establish that rate?

A. I don't know of any.

Q. Now, what competitive conditions are there at Spearfish, where there are no Fourth Section violations, to require you to blanket that rate?

A. We do not charge the same rate; the rate is higher.

Q. Not from Seattle, it is not is it, to Spearfish than it is to Clearmont? It is from Spokane.

A. Well, of course the Chicago, Milwaukee & St. Paul operate in that territory.

Q. Well, do they operate—they don't reach those points, do they?

A. Deadwood?

Q. Spearfish.

226 A. They reach Deadwood, not Spearfish; that is a local point.

Q. Now, you recognize competition between carriers for the purpose of making a blanket rate. Do you think that is a justification?

A. I think so, yes.

Q. But in doing that you disregard competition of communities?

A. We do not disregard competition between communities on our own line, that I know of.

Q. But on Branch lines?

A. On branch lines, that is entirely different.

Q. That is entirely different. You do maintain a blanket rate frequently, on account of rail competition—you have just said so?

A. Oh, yes, yes.

Q. But you disregard the competition of communities on those lines, even though it may cause discrimination between communities. You claim that right?

A. I do not quite get your meaning, Mr. Campbell.

Q. If there was rail competition at Buffalo, there would have been a joint through rate in all probability, would there not?

A. I suppose so.

Q. And you would have recognized that competition as justification for the establishment of such a joint rate—if there had been railroad competition at Buffalo?

A. If there had been rail competition at Buffalo and we
227 were forced to meet it, and if it was lucrative business, and if the rates were not unremunerative.

Q. Now, then, there is community and commercial competition between Buffalo and Clearmont, is there not?

A. Buffalo and Clearmont?

Q. Yes.

A. I hardly think so. I am not claiming that.

Q. But if there is, you claim the right to disregard it, is that your position?

A. I don't say that at all. I don't mean to give that impression.

Mr. Campbell: That is all.

Mr. Hagman: I want the record to show that some statement made by Mr. Hoffelder as to the holding of the Commission in those cases is not just as I understand the decision. We will have to refer to that for a correct statement of what the Commission ordered in those cases.

By Exam. Woodrow:

Q. Just one point, Mr. Hoffelder. Your Exhibit No. 3 deals with brick rates, and reparation involved on two other commodities, flue lining—isn't it, and fire clay?

A. They were charged the less than carload rate, Mr. Examiner, but to be perfectly frank with you, I was not able to check the rate that is shown on the Complainant's Exhibit.

Exam. Woodrow: Complainants were to furnish basis on which they desire reparation in regard to those two shipments, on
228 which they paid 47½ cents.

The Witness: If they were overcharged of course we can straighten that out.

(Witness excused.)

Mr. Hagman: All the defendants except the Wyoming Railway rest their case.

J. S. Reid was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Griggs:

Q. You may state your name, place of residence and official position.

A. J. S. Reid, Cedar Rapids, Iowa; Auditor of Revenue Accounts, Wyoming Railway.

Q. I will ask you, Mr. Reid, if you have charge of the matter of accounting of freight receipts, et cetera, for the Wyoming Railway?

A. Yes, sir.

Q. I will ask you, Mr. Reid, what this statement is.

A. This is a statement of traffic handled by the Wyoming Railway during the year of 1919, showing tons, revenue, percentage to total of tons and revenue, also ton miles, and revenue ton miles, on the commodities as indicated.

Q. Does this statement correctly show the total tonnage carried by the Wyoming Railway in the year 1919?

A. Yes, sir.

229 Q. This was prepared in your office, under your instructions and direction?

A. Yes, sir.

Q. Is the statement true in every particular?

A. To the best of my knowledge and belief it is correct.

Mr. Griggs: We offer the statement in evidence.

Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked "Defendants' Exhibit No. 4, Witness Reid," and is forwarded herewith.)

By Mr. Griggs:

Q. What is this Exhibit No. 5, Mr. Reid? What does it purport to show?

A. It is an analysis of traffic for the year 1919, showing number of carloads, number of tons, revenue, and the percentage to total in cars, tons and revenue, on each of the commodities as listed.

Q. And is this statement also prepared under your direction and in your office?

A. Yes, sir.

Q. And does it correctly represent the various items as described thereon?

A. To the best of my knowledge and belief it is correct, yes, sir.

Mr. Griggs: We offer this statement in evidence.

230 Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked "Defendants' Exhibit No. 5, Witness Reid" and is forwarded herewith.)

By Mr. Griggs:

Q. Referring now to Exhibit 6, what does that purport to represent?

A. That is an analysis of traffic for the year 1919, showing the division as between State traffic and interstate traffic in tons, revenue, and percentage of revenue, as based between State and interstate.

Q. This relates to the entire freight traffic carried by the Wyoming Railway in the year 1919?

A. Yes, sir.

Q. And was this statement likewise prepared from your books, under your direction?

A. Yes, sir.

Q. And correctly represents the various matters stated therein?

A. Yes, sir, to the best of my knowledge, and belief.

Mr. Griggs: Exhibit No. 6 is offered in evidence.

Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked "Defendants' Exhibit No. 6, Witness Reid," and is forwarded herewith.)

By Mr. Griggs:

Q. Have you any explanation to make of either of these
231 statements prepared by you?

A. No, sir, I think they clearly state what information I have.

Mr. Griggs: That is all.

Cross-examination.

By Mr. Campbell:

Q. As I understand Exhibit No. 4, your average revenue per ton-mile for that year was $.0987?
A. Yes, sir, that is correct.
Q. And that was all prior to the increase of August 26, of course?
A. Yes, sir.
Q. So that your revenues now, if increased 25 per cent, would be about $.115, instead of $.09; assuming that the same tonnage was handled your revenue per ton mile would be increased just 25 per cent, would it not, under the present rates?
A. Yes, sir.

Mr. Campbell: That is all I have.

(Witness excused.)

GEORGE E. BELT was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Griggs:

Q. You may state your name, place of residence, and official position with the Wyoming Railway.
A. George E. Belt, General Manager and Auditor. Residence, Cedar Rapids and Buffalo.
232 Q. How long have you been connected with the Wyoming Railway?
A. Since July, 1913.
Q. When was the Wyoming Railway organized?
A. The Articles of Incorporation, 1910.
Q. When was construction begun?
A. 1913.
Q. Mr. Belt, tell the Examiner the present condition of the Wyoming Railway with reference to total mileage, stations between which it operates, the general physical condition of the road, and any other facts pertaining to the Wyoming Railway which might be of interest to this Commission.
A. The mileage is 28.6. It operates between Clearmont and Buffalo; operates through a sparsely settled country, up the Clear Creek Valley.
Q. When was this railroad completed into Buffalo?
A. In 1918, I believe.
Q. How many stations are there on the road?
A. There are two—one station with Agent; the rest—and I think five prepaid stations, sidings, really.
The Railroad connects at the lower end with the Burlington.
Q. Is there any connection at the Buffalo end?

A. No.

Q. You say it has one station with Agent, an intermediate station with agent. What is the nature of that town. That, I presume is Ucross?

A. Ucross, yes.

233 Q. Tell the Commission the nature of this town of Ucross, the approximate population and the general conditions there.

A. The town is located at the junction of Old Piney Creek and Clear Creek. Its population I do not believe would exceed 100. I think it has one general store, and another store, a postoffice.

Q. What is the population of Buffalo?

A. Between 1,600 and 2,000.

Q. What is the population of Clearmont, so far as you know?

A. About 100; 150, possibly, I don't know.

Q. You say that it operates up the Clear Creek Valley. Tell the Commission the nature of the traffic that it carries through the Clear Creek Valley.

A. The most of the traffic is outbound traffic of livestock. It takes in general merchandise and supplies the town of Buffalo.

Q. Aside from supplying the town of Buffalo, has it any great volume of inbound merchandise?

A. It has nothing, practically, except that.

Q. What is the nature of the country that is supplied by this railroad? What are the chief industries of this country?

A. Livestock.

Q. It has been testified this morning that this Wyoming Railway follows a water grade. Can you tell the Commission the dif-

234 ference in elevation between one terminus and the other?

A. Clearmont is about 3,800 feet, 3,800 and some feet, and Buffalo is 4,600.

Q. So that there is a difference in elevation——

A. Between eight and nine hundred feet.

Q. What is the nature of the equipment of the Wyoming Railway? What have they in the way of equipment?

A. Very limited equipment: three locomotives; two combination cars, baggage and passenger and one chair car.

Q. And what in the way of freight equipment?

A. One box car and two flat cars is all the equipment.

Q. How many trains does it run daily?

A. One round trip.

Q. That is a combination train?

A. Combination train, passenger and freight.

Q. And the headquarters of the road are where?

A. Buffalo, that is, the operating headquarters. The general offices are in Cedar Rapids, Iowa.

Q. Are you familiar with the operating conditions of this road since the time of its organization?

A. Yes, sir.

Q. Tell the Examiner, briefly, the conditions under which this road is operated, with reference to financial difficulties and difficulties of physical operation.

A. The road started construction in 1913, and the war
235 broke out in 1914, which made it almost impossible to finance anything—that project—and the construction was delayed so that it was not completed until 1918 into Buffalo. Since that time, especially since 1913, the road has not been making its operating expenses.

Q. Why has it not been making its operating expenses? To what causes do you attribute that?

A. Well, largely to the general increase of all operating costs that there has been all over the country.

Q. So that your cost of operation has increased in common with other railroads throughout the United States?

A. Yes, and the revenue has not increased to a sufficient amount to offset.

Q. Did you have any difficulties with respect to obtaining materials and supplies to equip this railroad?

A. All during the war it was entirely if not almost impossible to obtain any supplies whatever for any purposes, the Railroad Administration requiring all material.

Q. As a result, what was the condition of your road?

A. Our road got in very bad physical condition.

Q. Is that condition improved at present?

A. It has improved some, yes, sir.

Q. But it is in good physical condition at the present time?

A. It would not be called in good physical condition, com-
236 pared with——

Q. Mr. Belt, you have charge of the records or the books and financial records of this company?

A. General charge, yes, sir.

Q. Now, Exhibit No. 7, tell the Examiner what this represents.

Mr. Campbell: I think there is an error in the date. You have got December, 1920.

Mr. Griggs: We will correct that. I am obliged to you.

By Mr. Griggs:

Q. What is this?

A. That is trial balance, showing general condition of the company at the end of the year 1919.

Q. I notice that this heading purports to be December 31, 1920. Is that correct or not?

A. It should be December 31st, 1919.

Q. So the Exhibit should be corrected in that particular?

A. Yes.

Q. Was this stat-ment prepared in your office and under your direction?

A. It was.

Q. And from the general books of your company?

A. It was.

Q. Does this statement correctly represent the matters purporting to be represented thereon?

A. It does.

Q. Does it correctly represent the financial condition of the
237 road at the time it was prepared?

A. Yes.

Mr. Griggs: We offer it in evidence, this Exhibit No. 7.

Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked "Defendants' Exhibit No. 7, Witness Belt," and is forwarded herewith.)

By Mr. Griggs:

Q. Referring now to the Exhibit No. 8, you may tell, Mr. Belt, what this is supposed to represent.

A. It is a statement of the operating revenues and the operating expenses, or the revenues and operating expenses for the years ending 1914, 1915, '16, '17, '18 and '19.

Q. Was this likewise prepared in your office, under your direction?

A. Yes, sir.

Q. And correctly represents the condition of the books of the Wyoming Railway?

A. It does.

Q. Is the statement here shown true and correct as to the matters delineated thereon?

A. Yes, sir.

Mr. Griggs: We offer in evidence, Exhibit No. 8.

Exam. Woodrow: It will be received.

(The statement was received in evidence, thereupon marked Defendants' Exhibit No. 8, Witness Belt," and is forwarded
238 herewith.)

By Mr. Griggs:

Q. Referring now, Mr. Belt, to the Exhibit, No. 8, and as to the first line thereof, you may tell the Commission what items were included in the freight revenue, as contained on the first line. What is this supposed to represent?

A. That was the receipts from the freight handled, both incoming and outgoing over the road.

Q. Does this figure represent the entire receipts from all freight handled by the railroad during the years respectively stated?

A. It represents the approximate proportion of what they earned, yes. It does not represent the entire amount collected.

Q. How about the passenger revenue, does that likewise represent all that was received from the carriage of passengers?

A. It does.

Q. And the same is true of the other items noted thereon?

A. Yes.

Q. You may tell the Commission what the total receipts from

operation of this railroad amounted to in the year 1918 and likewise in the year of 1919.

A. In 1918 it was $77,146.74. In 1919 $92,897.11.

Q. Turning to the other side of your account and referring now to the expenditures, I note in there several items marked "Superintendance."

239 You may explain to the Commission what these various items of superintendence were, and why they were separated.

A. Well, it is in accordance with the accounting as prescribed by the Interstate Commerce Commission, Superintendence of Maintainence and superintendence of transportation, they are different accounts.

Q. But these are separated, then, in accordance with the forms required by the Commission?

A. Yes, by the Commission, prescribed forms of accounting.

Q. Do these items of expenditure include and embrace all items of expenditure of the railway for the years as respectively stated?

A. All the items of expenditure, yes.

Q. You may now state to the Commission what the total operating expense of the railway was for the year 1918 and also for the year 1919.

A. The operating expense, alone, was for 1918, $76,936.87; for 1919, $72,618.86.

Q. Then for the years 1918 and 1919, referring only to the operating expense, what was the profit above cost of operation?

A. Well, that is different.

Q. Earnings above cost of operation?

A. The figures I quote do not include the hire of equipment. All those income debits, which are in the way of operating expense——

240 Q. I will refer to that in a minute.

A. Well, the operating revenue, then, for the year 1918,—I will have to ask you whether that is——

Q. It is $209.87, and the other is $20,278.25.

A. $20,278.25. My copy is not plain at all.

Q. What are the items referred to on this report as income debits? Explain that to the Examiner.

A. They are the hire of equipment, what we pay foreign roads for the use of their equipment. The railroad tax accruals, our taxes——

Q. On what?

A. On the railroad property.

Q. That would include your County and State taxes?

A. That would include the County and State taxes. And that is about all the items, except——

Q. What would the item of "Hire of Equipment" include. What are embraced in that item?

A. The amount we paid foreign roads for the use of their cars while on the Wyoming line.

Q. What arrangement have you with foreign roads with reference to that?

A. We pay the regular prescribed per diem.

Q. What is that?

A. At the present time it is 90 cents.

Q. Per day?

241 A. Per day, yes.

Q. And that is the usual and customary charge to foreign roads?

A. It is the universal charge, I believe.

Q. So that there is nothing unusual or exceptional in that charge, so far as the railroads are concerned. Referring, then, further to the statement and after deducting from the balance shown of total operating revenues, the operating expense and these income debits, what is the condition for the years 1918 and 1919 with reference to earnings?

A. Well, in 1918 it shows a loss of $8,080.34, and in 1919 a profit of $11,539.99—purely operating revenue.

Q. Referring then, further to the report, what are the items of "Interest on Funded Debt" and "Interest on unfunded Debt" which appear below?

A. Interest on Funded Debt includes the interest charges against the bonds or any other obligation of the Company, the maturity of which extends to a time, longer time than one year. Interest on Unfunded Debts is the short time notes, interest on short time obligations.

Q. Can you state at this time what the bonded indebtedness of the Wyoming Railway was at the close of the year 1919?

A. This exhibit does not show it. It was about $519,000, I think.

Q. Referring now to the Exhibit No. 7, being the trial

242 balance for December 31, 1919, you may state what the bonded indebtedness and the unfunded debt of the railroad was on December 31, 1919.

A. The bonded indebtedness was $536,000, and liabilities $117,452.70.

Q. You have just testified to current liabilities?

A. Yes.

Q. Of the road. After deducting from the total receipts the various deductions you have just testified to, you may state the condition as of December 31, 1918 and 1919 of the revenue of the company.

A. Deducting—the net operating revenue after deducting interest charges, was for 1918, a loss of $43,480.72, and in 1919 $24,917.89.

Q. Was the interest upon the bonds of this company paid in the years 1918 and 1919?

A. It was not.

Q. How long has it been since this company has paid the interest upon its bonds?

A. About two and one-half years, I think.

Q. Has this company at any time since its organization paid any dividends upon its stock?

A. No, sir.

Q. How many years did it pay interest on bonds?

A. It paid interest on its bonds for three years, I think.

243 Q. Since then there has been no interest paid on bonds?

A. That is correct.

Q. Mr. Belt, suppose that the revenues of this company were materially decreased by a decrease of rates, what would be the financial effect upon the company?

A. It would have to cease business.

Q. If this company has operated at a loss for the past two years, why has it not already ceased business?

A. It has been living in hopes that the conditions might change; also that they might receive some reparation from the Government, I believe, during the time the roads were under Government Control.

Q. Has it received any such to the present time?

A. It has not.

Q. And what are the present conditions with reference to the prospects of greatly increasing the revenue at the present time? In other words, would you say that at the present time there was reason to believe that the revenues will be materially increased from natural causes?

A. No, sir.

Exam. Woodrow: We will adjourn until two o'clock.

(Whereupon at 12:35 P. M. a recess was taken until 2:00 o'clock P. M.)

244 After Recess.

GEORGE E. BELT resumed the stand.

By Mr. Griggs:

Q. Mr. Belt, supposing that the revenues of the Wyoming Railway should be materially curtailed, what would be the result upon the operation of the railroad?

A. The railroad would be unable to operate.

Q. In your opinion, Mr. Belt, does this Wyoming Railway fill a need in the community which it serves?

A. I believe it does.

Q. What would be the conditions in and about Buffalo and in Johnson County generally, if the railroad should cease to operate?

A. They would have to depend upon team freighting and truck freighting, the same as they did before the railway was constructed.

Q. From what points would the merchandise have to be freighted?

A. It was almost exclusively from Clearmont before the railroad was built, part of the freight coming from Sheridan, possibly.

Q. What is the relative cost, if you know, of trucking, with reference to the rates now charged by the Wyoming Railway? Would it be greater or less?

A. It would be greater.

Q. In addition to that it is always possible to secure freight by teams and trucks?

A. No, there are certain times of the year when the roads
245 are impassable. Last winter I guess trucks ceased business between Sheridan and Buffalo for three or four months; I don't know the exact time.

Mr. Griggs: I believe that is all.
Exam. Woodrow: You may cross examine.

Cross-examination.

By Mr. Campbell:

Q. Mr. Belt, you say this road was commenced in what year?
A. 1913.
Q. How did that road come to be built there?
A. Well, I don't know that I can give you the exact reason. The citizens of Buffalo had been trying to get a road in there for years. It had been started, I believe, in 1910 by some other citizens of Buffalo and they tried to finance it, and the organization goes back to 1910, but the financing failed, and they finally got folks interested that took up the matter.
Q. Is it not a fact that the stockholders of the railroad are also stockholders in a large land company in and about that vicinity?
A. That is not exactly the truth.
Q. To what extent is that true?
A. The stock of the railroad and the stock of the land company are owned by the same company.
Q. And does this same company not own also oil lands which they are developing?
246 A. No. No, they have—some of the individuals may have some interest in oil, but the company has not.
Q. Now, this land company owns, controls under option, large quantities of land in that section, does it not?
A. They own some land. They have nothing under option now, I believe.
Q. And this railroad was built to a large extent for the purpose of developing and increasing the value of this land?
A. It was built for the development of the whole country, yes.
Q. And it is true that the land owned by this company, that also owns the stock in the railroad, has increased very materially in the last few years?
A. All the land, all lands in Johnson County have increased.
Q. And largely due to the fact of the building of the railroad?
A. Yes, sir, that was one element.
Q. Now, Mr. Belt, when was your line finally built into Buffalo?
A. 1918; I think it was in February. I am not sure exactly of that date.
Q. Prior to the completion of the line into Buffalo, how were the commodities in and out of Buffalo handled?
A. To the completion of the line?
Q. Yes.

A. We began hauling when the line—run freight cars to that point, and I think all the freight that was handled in 1914 and '15 was handled as far as Ucross. From that point it was
247 teamed on.

Q. Then it was finally built within a mile or two of Buffalo in 1919, was it not?

A. No, it was built into Buffalo in 1918, I think.

Q. How close to Buffalo had it reached and then stopped for a considerable length of time, before finally built into Buffalo?

A. Well, it had a number of terminals: first completed to Ucross and operated almost a year to Ucross; then it operated to a little station they called Watt, about a year; from there it operated another series of months to the station of Redman, and then it was built on to two miles, maybe a mile and a half this side of Buffalo.

Q. How long did it remain a mile or two miles out of Buffalo?

A. I cannot give you that accurately. I don't know.

Q. Now, did not the company in order to build into Buffalo, go to Buffalo and sell stock to the citizens for the purpose of raising money to build it into Buffalo?

A. No, sir, there were some bonds placed back in 1913 in the town of Buffalo.

Q. Now, Mr. Belt, your line has not been a completed line except for a period of approximately two years?

A. About that.

Q. And during the last of the two years you earned $20,000 over and above your operating expense, the year 1919?

A. Well, the fixed operating expense, without hire of equipment.

248 Q. I mean operating expense.

A. Yes, pure operating expense.

Q. So that your ratio of operating expense to operating return is not unduly high, is it?

A. I believe our operating expense is economical.

Q. Is economical. Now, don't you think that that is a remarkably good showing for a new railroad that has been built but two years?

A. Well, that shows in the red as much as it does—I don't believe it is.

Q. Your average return on all traffic for 1919 was $.0987, was it not?

A. I do not know.

Q. That is shown on Exhibit No. 4, and if that is shown do you have reason to believe that that is correct?

A. Yes.

Q. Can you name any short line or any other railroad in the United States whose average return on all freight was higher than that during the year 1919?

A. I cannot, nor can I name one that is lower. I am not familiar enough to form a judgment.

Q. Now, on August 26, your rates were increased 25 per cent, the same as every other railroad in this vicinity?

A. This last August, yes, sir.

Q. Yes. Now, if in 1920 you shall have the same amount
249 of traffic and your operating expense is not more, you will have earned sufficient to pay something over and above all your expenses, will you not?

A. No, I don't think 25 per cent will quite catch up our deficit, will it?

Q. My figures show it will amount to $26,428, while your deficit is $29,917.

A. Since the award of the Labor Commission our operating expenses are bound to increase. We cannot keep that down to this ratio.

By Exam. Woodrow:

Q. Has the State of Wyoming permitted the 25 per cent increase in the State?

Mr. Campbell: I think it has.

A. Yes.

Mr. Campbell: I think the only state that did not was Idaho, and possibly Montana, in passenger rates. California has given the increase. At any rate, Wyoming I think has.

By Mr. Campbell:

Q. Now, Mr. Belt, in view of all those circumstances, the building of this road, the completion in such a short time, don't you think that you could go before your stockholders and claim that that was a remarkably good showing for that line?

A. I cannot make the stockholders believe that.

Q. How much, Mr. Belt, of the capital stock of this railroad has actually been paid in?

250 A. Capital stock? Our book record shows it is all paid, full paid.

Q. So that the stock and bonds actually represent true value, do they?

A. Stock and bonds our book value shows, is the value of the road, yes.

Q. And did you have to sell any of those bonds at less than par?

A. Yes, sir.

Q. How much?

A. Fifteen per cent, and also a share and a half of the common stock.

Q. So that to the extent of fifteen per cent——

Mr. Griggs: One moment. I think your statement about a share and a half of common stock perhaps is in error. Aren't you referring to the Wyoming Company?

A. Yes, I am referring to the Wyoming Company.

Mr. Griggs: Let us keep these two corporations clear.

By Mr. Campbell:

Q. Then to the extent of 15 per cent of the bonds it does not represent true value so far as the actual money is concerned?

A. It is a discount which has to be taken up in our operating expense and amortized.

Q. When this road was built you bought second hand rails, did you not?

251 A. Yes, sir.

Q. And second ties?

A. No, sir.

Q. And all your equipment was bought second hand?

A. Well—all of our equipment?

Q. Yes. Your engines were old engines?

A. They were rebuilt engines.

Q. And your cars were second hand cars?

A. Yes.

Q. And you have had considerable expense in the maintaining of that old equipment, have you not?

A. Yes, we have, naturally more than if they were new, I suppose.

Q. And you have had a good many accidents on account of it, haven't you?

A. On account of the equipment? No, sir.

Q. Didn't you have an accident just recently where the engine, on account of its condition, tipped over?

A. No, sir.

Mr. Griggs: If the Examiner please, I want to offer an objection to this form of Cross examination as being wholly immaterial. I cannot see that that makes any difference in this issue at all.

Exam. Woodrow: Counsel will please bear in mind that there are three more cases to be heard to-day, and the record is

252 rather long already.

By Mr. Campbell:

Q. Now, Mr. Belt, you say if this railroad was abandoned, the people of Buffalo would have to resort to trucks, is that true?

A. That is given as an opinion. I don't know what they would do.

Q. And you thought it would be to their disadvantage. Is it not a fact that recently you have reduced your intrastate rates from Clearmont to all points on your line to meet truck competition?

A. Recently? No, sir.

Q. Will you look at Wyoming Railway Local Freight Tariff effective August 28th?

A. Well, that is not a reduction. That is an increase.

Q. But it is an increase of reduced ra[illegible], rates reduced for the purpose of meeting truck competition?

A. There was a rate put in between Sheridan and Buffalo that was something over—I guess been in for three year or more.

Q. Well, it was made for that purpose?

A. That was one of the purposes, possibly.

Q. So that intrastate you maintain between Clearmont and Buffalo a first class rate of 35 cents, do you not?

A. As to the intrastate rate I cannot give you the rates without——

Q. I will ask that this be marked and be introduced as part
253 of the cross examination of Mr. Belt.

(The tariff was received in evidence, thereupon marked "Complainants' Exhibit No. 9, Witness Belt," and is forwarded herewith.)

By Mr. Campbell:

Q. Now, Mr. Belt, that shows a first class rate of 35 cents, while the first class rate in your tariff does——

Mr. Griggs: We want to object, if the Examiner please, to questions of this witness upon the rates, for the reason that he is not qualified, nor have we asked him on direct examination.

Exam. Woodrow: The objection is well taken. Please confine your cross examination to the direct examination. If you have any rate matters that you want to bring out, counsel will bring them out by some other witness.

Mr. Campbell: We will put them in in rebuttal.

By Mr. Campbell:

Q. One thing I want to ask you about: you have here in expenses "Woolhouse." What is that?

A. Woolhouse? We have for the handling and storage of the wool that is cut in that region, wool clipped every year, built a warehouse, and you will note there is a revenue from that warehouse, and this woolhouse has an expense, and the expense is handling and storage.

Q. Sort of a freight house?

A. That is what it is. Our tariff covers that, I believe.

Q. Have you any high priced salaried men as Presidents
254 or Managers of this railroad?

A. Have not.

Q. Your operating wages are along about the same as other roads of similar construction?

A. Our operating expense as a rule I think is less than trunk lines in all departments.

Mr. Campbell: I think that is all.

Redirect examination.

By Mr. Griggs:

Q. In reference to high priced salaried men, do the officers or directors of this company receive any salary whatever?

A. They do not.

Mr. Griggs: That is all.

By Mr. Hagman:

Q. In the answer of the Wyoming Railroad Company in this case I think it is stated that application was made by your road to the Burlington Road to establish joint rates?

A. On all material, I understand that to be the case on everything.

Q. If such joint through rates were established, how much less will your road be able to take than it now receives for transporting goods over the Wyoming Railroad?

A. We could not exist—we would have to have the full amount at least of our present local rate in any division that they made, in order to enable us to exist.

255 Q. Is your road willing to voluntarily establish any joint rate in which it will receive less than its present local charge?

A. I do not think so.

Q. In view of your financial condition and operating and traffic conditions do you believe that you can carry your traffic for any less money than you are now carrying it?

A. We cannot.

Mr. Hagman: That is all.

By Mr. Campbell:

Q. And you have no objection to the establishment of joint rates, providing satisfactory divisions were given to your line?

A. Providing that we would receive at least as much as we are receiving now.

Q. What proportion of your entire business would the traffic involved in these rates be?

A. This traffic? I am not prepared to answer that.

Mr. Griggs: That shows on the exhibits—the exhibits will show that.

By Mr. Campbell:

Q. Now, it would naturally increase the amount of the business, would it not, if there was a joint through rate which was no higher than the Clearmont rate?

A. It might; I don't know.

Q. And if it did, some of the slack would be taken up by increased business, that would be true, of course?

256 A. If it did increase the business.

Q. Yes. Now, have you figured the amount of loss it would be upon this traffic if you had to cut your rates below what they are now—what difference it would make in your revenue? Have you considered that at all?

A. I cannot give you the figures, no, sir.

Exam. Woodrow: Mr. Belt does not qualify as a rate expert, and the testimony has not pertained to that.

Mr. Campbell: But he has testified as to what effect this will have on his revenue, and to that extent I have a right to inquire, it seems to me. Now, he is the General Manager, he is the man that is responsible for this revenue, and he is here testifying as to the revenue and the effect it will have upon it, and that is what I am inquiring about.

By Mr. Campbell:

Q. You have men, have you not, in your enploy that could figure that out?

A. Yes, sir.

Q. And that has not been done?

Mr. Griggs: I would like to know what it is that you want figured out. I have not that plain in my mind. I don't know what you want. What is it you want, please?

Mr. Campbell: I want to know what the proportion of this traffic is to the total traffic, and what the loss——

Mr. Griggs: That is all on the exhibit. Now, what else do you want.

257 By Mr. Campbell:

Q. Now, if you were required to take a division along the same lines as divisions are granted in this same general territory to other lines, do you know what those divisions are?

A. No, sir.

Q. Have you inquired?

A. No, sir.

Q. Did the Burlington, when you requested a joint through rate, make any suggestions as to what divisions they were willing to give you?

A. The request was not made by me, and I do not know what arrangement was made or what answer was made.

Q. Do you know what answer was made by the Burlington?

A. No, sir, I do not. Nothing done, I think, so far.

Mr. Campbell: I think that is all.

(Witness excused.)

Exam. Woodrow: Refer back to the record to the reference to the cross examination which was out of place.

(The Reporter read a certain portion of the cross examination and the tariff which was introduced on cross examination as "Complainants' Exhibit No. 9," was withdrawn.)

Exam. Woodrow: Next witness.
Mr. Griggs: That is all.
Mr. Campbell: I would like to recall Mr. Brown for identification.

258 R. S. BROWN was thereupon recalled, and having previously been sworn, testified further as follows:

By Mr. Campbell:

Q. Mr. Brown, referring to Exhibit marked "Witness Belt, Exhibit No. 9," I will ask you to state what that is.
A. Exhibit No. 9 is a tariff filed with the Wyoming Public Service Commission, bearing their number 10, Proportional Local Freight Tariff Applying on Classes between Clearmont, Wyoming and stations on the Wyoming Railroad. It is restricted in its application as follows:

"Rates shown in this tariff apply only on shipments originating at or destined to Sheridan, Wyoming, and apply only on intrastate traffic."

This tariff says that the first class rate, for instance, between Clearmont and Buffalo, is 35 cents on traffic that originates at or is destined to Sheridan, Wyoming.

Mr. Campbell: Now, we desire to offer exhibit No. 9 for the reason that the Examiner having held that that line of cross examination was improper of Witness Belt, I would like to offer that as rebuttal testimony.
Exam. Woodrow: All right, what do you expect to prove by that?
Mr. Campbell: I expect to prove that intrastate class rates are lower than the class rates when applied in connection with interstate traffic.
259 Exam. Woodrow: Has the Wyoming State Commission anything to do with that intrastate rate?
Mr. Campbell: Yes, I presume it has been allowed by them. Now, will you refer to Exhibit 8?
Exam. Woodrow: The Examiner does not of course realize what counsel has in mind.
Mr. Campbell: I have in mind this: he says that these rates cannot be reduced because of loss of revenue, and yet he goes and reduces his class rates intrastate, all his class rates, way below the figure of his regular class rates when applied to interstate traffic, showing that he can reduce these rates below the point where he has them now when it suits his convenience.
Exam. Woodrow: You don't know whether that is required by the Wyoming State Commission or not.
Mr. Campbell: I asked him if it was not done to meet the truck competition. I don't know what it was done for. I don't think it

is material what it was done for. They can explain what it is done for if they wish, but I want the fact to appear.

(The tariff so offered was received in evidence, thereupon marked "Complainants' Exhibit No. 9, Witness Brown," and is forwarded herewith.)

By Mr. Campbell:

Q. I offer Complainants' Exhibit 8, Witness Brown, and ask you to state what the class rates as shown in that exhibit are.

260 A. Exhibit No. 8 is Wyoming Railway Company's Local Freight Tariff I. C. C. No. 38, applying on classes and commodities between stations on the Wyoming Railway Company, which was made effective on interstate business August 26, 1920, intrastate August 28, 1920.

Q. What is the 1st class rate?

A. The 1st class rate between Clearmont, Wyo. and Buffalo, Wyo. in this tariff is 59 cents.

Q. Contrasted with 35 cents under the State rate?

A. Yes. Of course that State tariff applies on business to and from Sheridan, only.

(The tariff in question, so identified, was received in evidence, thereupon marked "Complainant's Exhibit No. 8, witness Brown" and is forwarded herewith.)

Cross-examination.

By Mr. Griggs:

Q. Do you know why this rate was established?

A. I have no idea.

Q. This tariff, Wyoming P. S. C. No. 10, referred to by you, says that it is applicable only on shipments originating at or destined to Sheridan, Wyoming, and applies only on intrastate traffic?

A. I made that statement.

Q. As a matter of fact, in addition to the local rate on the Wyoming, which is referred to in this tariff, there is a local tariff on the Burlington between Sheridan and Clearmont, isn't that a fact?

A. Very true.

261 Q. Therefore, in order to meet competition with trucks between Sheridan and Buffalo, it was necessary to fix a rate between Sheridan and Buffalo via Clearmont which would meet it, is not that a fact also?

A. If they wanted to compete with that traffic it was necessary.

Q. Therefore, is it not true also that external conditions affected this tariff, that would not affect traffic on a direct line between Clearmont and Buffalo, that is true also, isn't it?

A. Yes, that is true.

Q. So that this rate in Wyoming P. S. C. No. 10 would be based on very different and external conditions from what an ordinary

rate would be for the same distance, because it is a competitive rate? Doesn't that explain this rate to you?

A. Not to me, no. I know what the tariff is, and the tariff don't explain the reason for its being in there.

Mr. Griggs: That is all.

Exam. Woodrow: Is that your case?

Mr. Griggs: That is our case.

Mr. Campbell: That is our case.

Exam. Woodrow: The Examiner would like the complainants' counsel to restate his position with respect to the future rate and his position with respect to the reparation involved in these shipments, in a word.

Mr. Campbell: Since the question came up yesterday, I
262 have gone over the complaint more carefully. As stated before, I did not draw the complaint, and I had not probably gone over it as carefully as I should have. But I think there can be no mistake in the position, from the complaint. The prayer is perfectly plain and asks exactly upon what basis reparation should be granted. It asks for the establishment of a reasonable rate for the future, and then asks for reparation between the rate paid and the rate established as a reasonable rate. I got confused on it yesterday, but there seems to be no confusion whatever when you read the prayer. The prayer is, "Wherefore complainant prays that the defendants may be required to answer the charges herein and after due hearing and investigation an order be made commanding the said defendants to publish just and reasonable through interstate rates for the future, and that each of them be ordered to pay to complainants by way of reparation for the unlawful charges hereinbefore alleged, the difference betwen the charges assessed, as shown in Exhibits A, B, C, D and E, attached hereto, and charges based on rates found to be reasonable."

Now, there is no—there cannot be any mistake in regard to that. Whatever rate this Commission finds to be a reasonable rate for the future, that establishes the reparation, between that and what was actually paid. Under the prayer of the complaint there could be no other position taken.

263 Now when I read that yesterday I read it hurriedly and I thought it stated it differently, but I think it is perfectly clear, and that is our position.

Exam. Woodrow: You are not attempting to qualify the position taken with respect to the reparation feature upon the double increase?

Mr. Campbell: The double increase I think is evidence going to the question of the reasonableness of the rates at the time, but the measure of reparation, however, is clearly stated. I think the evidence as to the double increase is evidence going to the reasonableness of the rate charged during Government Control, but I do not think it has much to do with the establishment of a reasonable rate for the future.

Exam. Woodrow: Does Counsel realize that the record is full of

admissions that if the single increase had been applicable that there would be no reparation feature in this case?

Mr. Campbell: What is that?

(The Examiner's query was read.)

Mr. Campbell: No, I do not think there are any admissions of that character. I stated yesterday that it was our contention—it was from a misreading of the complaint at that time—that we claimed that for the movement under Government Control reparation should be the difference betwen the double and the single increase,
264 but I think that under the complaint that would not be true—it would be the establishment of the rate for the future—unless the Commission found that there was no necessity or no evidence sufficient to justify the establishing of any different rate for the future. Then in that event I think we would be entitled to reparation on the double increase.

Exam. Woodrow: Have you anything to say, Mr. Hagman?

Mr. Hagman: Nothing except to say that defendants take the position that both of those allegations of the complaint clearly show that reparation is based on the fact that each separate factor was increased instead of only one increase applied, and it seems to me that if Mr. Campbell intended anything else he should have made it sufficiently plain so that we would not have to have this argument about it here. He has not amended his complaint and that is the issue presented, and I think we will insist on the issue being as made by the pleadings.

Exam. Woodrow: Have complainants any further testimony with respect to damages in support of the alleged violation of Section 3?

Mr. Campbell: No. We have shown the discrimination; we have shown the competition we have had to meet, and that is the issue arising in cases of this kind.

Mr. Hagman: They are not asking reparation because of discrimination feature, so there would be no necessity of proving
265 damage by reason of discrimination. They are alleging discrimination in support of their request for a joint rate for the future, as I understand it.

Exam. Woodrow: Is that the complainants' position?

Mr. Campbell: I don't know as I get that.

(The statement of Mr. Hagman was read.)

Mr. Campbell: We are claiming damage, reparation, upon all of the testimony of the complainants. The Commission has refused repeatedly to grant reparation where there is nothing but discrimination alleged, and I presume that they may take that position here. I have always claimed they were wrong, but nevertheless they have usually taken that position, that they do not grant reparation on discrimination cases.

Exam. Woodrow: Without damages shown.

Mr. Campbell: Yes, and that is a very hard thing to do in discrimination. It is pretty remote, pretty hard to show.

Exam. Woodrow: The Examiner was just bearing in mind those facts. Have you anything further?

Mr. Campbell: I am frank to say under the rulings of the Commission if we had nothing but discrimination in thi case I doubt very much if there would be sufficient in the record to support reparation.

Exam. Woodrow: You rely entirely on Section 1 for reparation in this case?

Mr. Campbell: Section 1, and section 10 of the Federal
266 Control Act, and of course the rules established by the Director General.

Exam. Woodrow: And you are, in effect, withdrawing your allegation as to Section 2 and Section 3?

Mr. Campbell: I am not under any circumstances withdrawing either. We are maintaining that a through rate should be granted for the future because of violations of Sections 2 and 3.

Exam. Woodrow: Not relying upon them for reparation?

Mr. Campbell: No, not relying particularly upon them as to reparation.

Exam. Woodrow: Anything further in this case, gentlemen? Do counsel want to discuss the case?

Mr. Campbell: We are through. I think that this is a case that ought to be briefed. I don't think we want to waive the privilege of briefing this case.

Exam. Woodrow: Briefs will be due on October 22. Do you desire argument before the Commission?

Mr. Campbell: Is it not the custom to defer that until the Examiner's report, and then file exceptions? I do not want to waive any right to ask for argument.

Mr. Griggs: I might say in reference to the position of the Wyoming Railway, the Chief Counsel for this Company are located in Chicago. I came into this case really at the last moment, and I
267 am not clear now, without conferring with them, whether they would care to have argument before the Commission or not. Would it be possible to leave that matter open?

Exam. Woodrow: That can be set forth in your exceptions to the Examiner's report, if there be any.

If there is nothing further this record is closed.

(Whereupon at 2.45 o'clock P. M., on the Seventeenth day of September, 1920, the hearing in the above-entitled matter was closed.)

268 EXHIBIT No. 1.

Interstate Commerce Commission.

Docket No. 11608.

Witness, Brown.
Complainants' Date, 9-16-20.
Reporter, Flannery.

Freight Rate Authority No. 10.

Increased Charges under General Order No. 28 for Continuous Through Hauls Subject to Combination Rates.

Freight Rate Authority No. 10 of the Director, Division of Traffic, dated July 2, 1918, reads as follows:

Application of Increases under General Order No. 28 to the Through Movement of Commodities Except Grain and Its Products.

"Under date of June 8, 1918, I wired as follows:

'Rates as increased by Section 2, Paragraph 4, Order 28, should be applied to the through movement of commodities, except grain and its products. Where increase is on percentage basis the result will be the same whether applied to combinations or through rates but where flat or maximum increase per ton or hundred pounds is made some adjustment will be necessary to apply the increases to the through movement. This should be accomplished where possible by publication of specific through rates or by use of proportional rates. Use this basis as far as practicable in publishing tariffs effective June 25, 1918.'

On the 17th instant I wired again:

'Referring to my wire eighth authorizing application of increases under Section 2, Paragraph A, General Order 28, to the through movement of commodities, except grain and its products. The Interstate Commerce Commission will accept special supplements containing the following:

'When the total charges on a through shipment of any of the commodities specified below are constructed on combinations of separately established rates applying to and from junction points, first determine the through combination of rates in effect on June 24, 1918, and then increase such through combination of rates by the amounts set opposite each such commodity, viz.:'

269 Here should follow a list of all of the commodities and the increases thereon named in Paragraph A, Section 2, except grain and its products and except coal and coke. We do not wish to apply the specific increases to the through haul of grain and its products, and coal and coke rates are so complicated as to make it impossible to use this general rule for them. Would be glad to have this provision used in special supplements wherever needed and wherever possible to make effective by June 25, 1918.

I appreciate that the time elapsing between the date of these telegrams and June 25 was so short that in many instances it was impossible to bring about the application of rates under General Order No. 28 as outlined in my wire of the 8th, and as it is desirable to bring this application about as rapidly as possible this will be

authority for such publication as is necessary to apply to the through continuous haul of the commodities named in Paragraph A, Section 2, of General Order No. 28, and increases as shown therein, except on grain and its products.

You will also arrange such publication as will apply the minimum scale of class rates as provided in Paragraph D, of Section 1, and the minimum carload charge of $15.00 per car as provided in Paragraph B of Section 5 of General Order 28 as amended to through continuous hauls.

Please quote in schedules making such publication "Freight Rate Authority No. 10" in the manner prescribed in Circular 1-A, July 1, 1918, as authority for the publication which shall be made on one day's notice and filing with the Interstate Commerce Commission.

Also show on title page of schedules in large type "United States Railroad Administration, W. G. McAdoo, Director General of Railroads."

Please note that the provision which my wire of the 17th instance stated would be accepted by the Interstate Commerce Commission, ran only to the special supplement to be published, effective June 25, 1918, so that the publication should now be made in regular form by use of through or proportional rates or such other manner as you think practicable under the Commission's Tariff Rules.

Yours very truly,

(Signed) EDWARD CHAMBERS."

(Here follows statement marked page 270, map marked page 271, statements marked pages 272, 273, 273½, and 274, and reproduction of printed pages 274½, 275, 276, 277, 278, 279, 280, and 281.)

[Map, page 271, endorsed on back as follows:]

271½ [Endorsed:] Interstate Commerce Commission. Docket No. 11608. Exhibit No. 3. Witness, Brown. Complainant's Date, 9-16-1920. Reporter Flannery.

EXHIBIT No. 1.

Interstate Commerce Commission.

Docket No. 11608.

Witness, Bolander.
Defendants' Date, 9-17-20.
Reporter, Flannery.

Great Northern Railway Company.

Statement Showing Various Rates on Forest Products from Representative Shipping Points in the Northwest for Distances Corresponding with Distances to Clearmont, Wyoming.

	Dist.		Rate Aug. 25th, 1920.	Rate per ton per mile.	Rate Aug. 25th, 1920.	Rate per ton per mile.	Issued by—	G. F. O. No.	I. C. C. No.
Libby, Mont., to Clearmont, Wyo.....	784.2	Fir & Pine...	.38¢	.0096	.47½	.0121	G. N. Ry.	250-B	A-4858
		Cedar	.47	.0119	.59	.0150			
		Shingles	.48	.0122	.60	.0152			
Bonners Ferry to Clearmont.....	838.8	Fir & Pine...	.38	.0091	.47½	.0113	"	250-B	A-4858
		Cedar	.48	.0115	.60	.0143			
		Shingles	.48	.0115	.60	.0143			
Priest River to Clearmont.....	889.5	Fir & Pine...	.38	.0085	.47½	.0106	"	250-B	A-4858
		Cedar	.48	.0107	.60	.0134			
		Shingles	.48	.0107	.60	.0134			
Albany Falls to Clearmont.....	893.4	Fir & Pine...	.38	.0085	.47½	.0106	"	250-B	A-4858
		Cedar	.48	.0107	.60	.0134			
		Shingles	.48	.0107	.60	.0134			
Libby to Mondak.....	659.4	Fir & Pine...	.35	.0106	.44	.0133	G. N. Ry.	650-D	A-4834
		Cedar	.37	.0112	.46½	.0141			
		Shingles	.42	.0127	.52½	.0159			

Statement Showing Various Rates on Forest Products—Continued.

	Dist.		Rate Aug. 25th, 1920.	Rate per ton per mile.	Rate Aug. 25th, 1920.	Rate per ton per mile.	Issued by—	G. F. O. No.	I. C. C. No.
Libby to Berthold, N. D.	781.1	Fir & Pine...	.38	.0097	.50½	.0129	R. H. Countiss.	18-C	1058
		Cdr. & Shgls.	.48	.0122	.64	.0163			
Bonners Ferry to Berthold, N. D.	830.7	Fir & Pine...	.38	.0091	.50½	.0121	"	18-C	1058
		Cdr. & Shgls.	.48	.0115	.64	.0154			
Priest River to Berthold, N. D.	886.4	Fir & Pine...	.40	.0090	.53½	.0120	"	18-C	1058
		Cdr. & Shgls.	.50	.0112	.66½	.0150			
Albany Falls to Lone Tree, N. D.	895.0	Fir & Pine...	.40	.0080	.53½	.0119	"	18-C	1058
		Cdr. & Shgls.	.50	.0111	.66½	.0148			
Seattle to Paola, Mont.	657.4	Fir & Pine...	.39	.0118	.49	.0149	G. N. Ry.	250-B	A-4858
		Cdr. & Shgls.	.42½	.0129	.53	.0161			
Seattle to Concord	783.7	Fir & Pine...	.40	.0102	.50	.0127	"	250-B	A-4858
		Cdr. & Shgls.	.45	.0114	.56½	.0144			
Seattle to Power	838.8	Fir & Pine...	.40	.0095	.50	.0119	"	250-B	A-4858
		Cdr. & Shgls.	.42½	.0101	.53	.0126			
Seattle to Wayne	886.8	Fir & Pine...	.40	.00902	.50	.0113	"	250-B	A-4858
		Cdr. & Shgls.	.47	.0106	.59	.0133			
Seattle to Chinook	891.9	Fir & Pine...	.41	.0092	.51½	.0115	"	250-B	A-4858
		Cdr. & Shgls.	.47	.0105	.59	.0132			

Prepared September 14, 1920, by Western Traffic Manager, Great Northern Railway Co., Seattle, Washington.

283 EXHIBIT No. 2.

Interstate Commerce Commission.

Docket 11608.

Witness, Bolander.
Defendants' rate, 9-17-1920.
Reporter, Flannery.

Before the Interstate Commerce Commission.

I. C. C. Docket Nos. 11224 et al.

WILBUR LUMBER COMPANY, et al. *et al.*, Complainants,

vs.

DIRECTOR GENERAL, as Agent, et al. *et al.*, Defendants.

Date, June 16, 1920.
Place, Washington, D. C.

Testimony of Mr. Hastings.

284 P. P. HASTINGS was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Finerty:

Q. Mr. Hastings, will you state your position with the Railroad Administration during the period of Federal control?

A. I am at present special traffic assistant, Division of Law of the Railroad Administration. For the two years during Federal control, beginning in March, 1918, and ending on March 1st, 1920, I was assistant in the Division of Traffic for the United States Railroad Administration.

Prior to that time for some 10 or 12 years I was either assistant general freight agent or general freight agent of the Santa Fe Railway at different points.

Q. In your connection with the Railroad Administration were your duties in any way connected with the Director of Traffic, Mr. Chambers?

A. Yes, sir; I was one of his assistants. I reached Washington to work with Mr. Chambers for the Railroad Administration in March, 1918, just about the date of the passage of the Federal Control Act. Prior to the passage of the Federal Control Act, which gave to the President the authority to initiate rates, I think no action had
285 been taken by the Railroad Administration relative to advances or changes in the freight rates, but from that time con-

sideration was immediately given to the subject, and in my capacity as assistant in the Division of Traffic, and very closely associated with the Director, I sat in, I believe, all conferences relating to freight rates. I also assisted in the preparation of general Order 28, and after General Order 28 was promulgated, I was given charge of the freight rates department and either in conference with Mr. Chambers, or acting on the authority delegated to me I passed on a great many of the questions arising under General Order 28 and personally review and signed for the Director practically all of the freight rate authorities which made voluntary concessions and changes in freight rates after the date General Order 28 became effective.

Q. That would include Freight Rate Authority No. 10 and Freight Rate Authority 6945?

A. Yes, sir.

Q. In the conferences preceding the issuance of Order 28, were you consulted and did you take part in those conferences?

A. Yes, sir.

Q. Were you familiar with the considerations actuating the Director General in issuing General Order 28?

A. I think so; yes, sir.

Q. Are you familiar with the purposes sought to be
286 achieved by General Order 28?

A. Yes, sir.

Q. Was it intended, by General Order 28, as originally drawn, that double advances should be made on coal under that order?

A. Yes. The order had the effect, and it was the intent of it, that the specific and maximum advances or increases named therein should be applied to each separately established rate.

Q. That is, that where the through rate was made up of combination rates, the flat increase provided by General Order 28 for coal, was to be applied to each factor of the combination rate?

A. Yes.

Q. That was the intent and meaning of General Order 28 as issued by the Director General?

A. Yes, sir.

Q. Will you state what was the reason for the subsequent modification of General Order 28 in this respect, by Freight Rate Authority No. 10?

A. Within a short time, within 10 days, I would say, following the promulgation of General Order 28, which was on May 27, 1918, there was brought to the attention of the Director of Traffic numerous instances where the carrying out of the order as it was written would have the effect of disturbing the relationship on coal and other
287 commodities where specific or maximum advances were made under the order, both between contiguous points of origin or destination, but particularly between the same points of origin and the same points of destination when the traffic moved by different routes, for the reason that if by one route between two certain points the rate was a specifically published through rate, and the specific or maximum advances were applied to that rate, while for another

route, which was open to handle the business, and a reasonably direct route, the same rate had been in effect prior to the issuance of General Order 28, but published by separately established rates——

Q. That is, combination rates?

A. As commonly called. I prefer the Commission's term "separately established rates." The separately established factors make the through charge. Had the specific advances been applied to each of these permanently, then it is manifest that the rates would have been made different, and that all of the traffic would have been routed by the shipper via the line which had happened to carry that charge by a specifically published through rate, and this latter feature of equalizing the rates for the different routes was the controlling feature of the issuance of the instruction which preceded Freight Authority 10.

Q. Was Freight Rate Authority in any way an admission
288 that the application of the double advances, the flat increase to both factors of a combination, or separately established through rate, was unreasonable?

A. No, sir; it was not.

Q. And was there any idea, in the issuance of Freight Rate Authority 10, that reparation should be paid in the interim between the publication of the double advance and the reduction in the single advance under Freight Rate Authority 10?

A. No, sir; that was not contemplated. As a matter of fact, we were working then under war conditions, when a very large part of all freight paid was being passed on to the Government in one form or another, and the conditions were so upset that we did not consider at all at that time that the charges which were assessed temporarily under the provisions of General Order 28, and which were modified afterwards by voluntary concessions in the adjustment of the relationship, as promised by the Director General at the time the order was issued, would be the subject of reparation, or that they could fairly be.

Q. Then, as I understand you, Mr. Hastings, it was not in any way intended by Freight Rate Authority No. 10 to admit that the double advances under General Order 28 were unreasonable in themselves, and the actuating reason for Freight Rate Authority No. 10 was to preserve the relationships between the through rates you have mentioned, where one through rate was constructed on the basis
289 of combination rates, and the other was a joint through rate?

A. That is correct. As I stated the latter reason was the controlling reason. We also had under consideration, and I have no doubt, took into account to a lesser extent, the maintenance of the relationship between contiguous points, adjoining districts, where the rate from one point was carried—take the coal district, for instance, Pennsylvania to New England. It was called to our attention that from the same districts rates via one route were on combination and via another route, specific through rates were published to the same destinations in New England. I don't want to go on record as saying that we considered only the point exactly served by the two routes, but the other points, the contiguous points, in the

same district were naturally affected in the same way, and that was given consideration.

Q. You considered two things; traffic between the same points served by different routes, some of which had joint through rates and some of which had combination rates, and also traffic from mines in the same district to the same or contiguous points of destination?

A. Yes, sir.

Q. Was it intended to preserve any relationship between competing fields by Freight Rate Authority No. 10?

A. It was not considered in that connection.

290 Q. Mr. Hastings, how long did Freight Rate Authority 10 remain in effect on anthracite coal?

A. On anthracite coal to Western Territory, the provisions of Freight Rate Authority 10 were cancelled on April 22, 1919, by Freight Rate Authority No. 6945. I have a copy of that authority here. The authority itself shows pretty clearly why the cancellation was brought about on that particular traffic. I can state it more briefly, though. It was because there was very forcefully brought to the attention of the Administration the fact that the anthracite coal via the rail-lake-and-rail routes, or the rail-and-lake routes to Western destinations was paying, as it was intended it should, and there never have been any modifications of that feature of General Order 28, an advance in the charge to the Lakes and an advance in the charge west of the Lakes; while one road, at least, and possibly others had, under Freight Rate Authority 10, published in its tariff some provision which made what is now known as the single advance on coal from the anthracite field to some points in Western territory, west of Chicago—it is very clear that that sort of action instead of preserving any relationships, disturbed any relationship that might have existed between the rail-and-lake and all-rail routes, and the conclusion was that inasmuch as that was a situation which had not been before us and was not contemplated by Freight

291 Rate Authority 10, although admittedly, if you please, within the knowledge of that authority,—no criticism ran against the road that had made that publication—we cancelled the authority on that traffic, and specifically provided in Freight Rate Authority 6945, that any publication theretofore made under Freight Rate Authority 10, in that situation, should be withdrawn and cancelled under Freight Rate Authority 6945.

Q. Was Freight Rate Authority 10 itself finally cancelled?

A. Freight Rate Authority 10 was finally cancelled on January 17, 1920. For some months previous to that date—in fact, as I recall, about the time that we cancelled it as to the anthracite coal, we had cases coming before us where it appeared that the application of Freight Rate Authority 10 went beyond what was contemplated as needful at the time the authority was issued. The Division of Traffic reached the conclusion that the authority should be cancelled, but for some time there was a difference of opinion in the Division of Public Service as to the method by which this should be brought

about, and no action was taken until January 17, 1920, when the cancellation, as shown in the letter entitled "Cancellation of Freight Rate Authority No. 10" of that date, was issued by the Director of Traffic, with the concurrence of the Division of Public Service.

292 Q. So that it was, by that, originally intended, under Order 28, that the so-called double advances should be made under that order, and finally determined, after experimenting with the single advances, that the double advances should be restored wherever there had not been a change under the original order——

A. Cancellation of Freight Rate Authority 1- is not that broad.

Q. It is not?

A. It says that no further publication should be made under the authority, but specifically states that this cancellation does not authorize the cancellation or revision of rates which already had been published under Freight Rate Authority 10.

Q. I started to add that to my question—without the disturbance of rates that had been reduced to the single advance under Freight Rate Authority 10, the cancellation of Freight Rate Authority 10 forbade the further reduction to the single advance?

A. That is correct.

Q. Mr. Hastings, I don't know whether or not you are familiar with the particular anthracite rates here involved, but I want to ask you, assuming that there were no joint through rates in effect from any points of origin on anthracite coal to any points of destination in these complaints, was that situation within the spirit of

293 Freight Rate Authority 10; even if it was within the letter of it?

A. It was not. I am quite familiar, not with the rates themselves, I couldn't quote any of them from memory, but I am familiar with the rate situation on anthracite coal to Western territory, and your assumption is correct; that there were no joint freight rates published, and that situation manifestly did not come within this that I have described as the reason for issuing Freight Rate Authority 10.

Q. Mr. Hastings, what have you to say as to whether or not General Order 28 was a general percentage increase, and in that connection?

A. Just a minute before we get to that question, Mr. Finerty. I would like to add that what I said a moment ago on anthracite coal is also true on a great deal of the bituminous coal, which I understand is covered by these complaints, namely, the bituminous coal from all fields east of Indiana fields, rates were made by combination of the rates to Western destination and hence the situation there is similar to the situation on the anthracite.

Q. And therefore, while they may have come within the letter of the Freight Rate Authority 10, they were not within the reasons actuating it?

A. That is true.

Q. Now, referring to my question as to whether or not Gen-

294 eral Order 28 was a general increase, with certain excepted commodities; was that the nature of General Order 28?

A. I am glad you brought that up, because while I haven't the benefit of the testimony in this case, I think it is very pertinent to all of these cases which deal with rates under General Order 28. There has very apparently been in the minds of a good many people dealing with these rates, including some of the railroad men, if you please, a misconception of the basis on which General Order 28 was issued. It is referred to occasionally as the "25% order," and we even have expressions from the Commission which would indicate, perhaps, that the man writing the opinion had based his conclusion on the fact that a certain increase was in excess of 25%.

Q. And therefore unreasonable?

A. And therefore unreasonable, and perhaps not in contemplation. I trust without ego-ism I can speak of what was in contemplation. Now, General Order 28 was not prepared as a 25%, or any other per cent order. It was well known to the Director of Traffic, some of his assistants, and traffic men with whom he consulted, that there were many rates in this country which were not bearing a fair share of the burden, and that was particularly true of a good many of the short-haul rates. It was true of some commodities. We could not attempt at that time to cure all such
295 evils in the rate structure of the country, even where they were known and admitted. We had to attempt to iron out some of the more glaring inconsistencies in the existing rate structure. First let me say right there that in March, April and May, 1918, the public was not educated, as it is today, to a general advance in rates, and we had to take into consideration, if you please, what the traffic would bear. Not all it would bear, but what the traffic would bear, even under the condition that existed then, with the increased expenses and proposed increase in wages which was then before the Administration. The Division of Traffic was furnished in these months from time to time by the statistician and the Division of Operations of the Railroad Administration with estimates of the additional revenue that would be needed to carry on the operation of the railroads. These estimates were raised almost from day to day. They handed them in to us several times, and each one was higher than the last. It is a matter of common knowledge, of which I have no doubt the Commission takes judicial notice, that even the last estimate fell far below what was actually necessary, because of further wage increases and further increases in the cost of material and supplies, but, of course, at that time we had to figure on the estimates that were handed to us. It was not within our jurisdiction to
296 go out and say, "These fellows don't know what they are talking about when they estimate eight hundred million or eight hundred and fifty million, or some other figure. We think it is two billion," because we had to figure our rates toward the figures given us by the other branches of the Administration, and in figuring that we took the various commodities which are shown as carrying specific or maximum increases under General Order No. 28, and in determining, from time to time—I think at one time we were figuring on five hundred and fifty million, and later eight hundred and fifty million—how much of that burden could fairly be put on

corn, and coal and bullion and sugar, and other commodities moving in large volume, and when we had that from these statistics which our statisticians were able to get from the Interstate Commerce Commission, we computed the amount of increase that would result from this flat or specific advance. Having reached that compilation, and knowing, also, approximately the amount that had to be raised, according to the figures that were given us then, we reached the 25% figure as the last thing under General Order 28, that being the increase necessary in the residue or remainder of the traffic or equal, as nearly as we could approximate, the total revenues that had to be raised. Now, it was intended that a good many things under General Order 28 should be increased more than 25%. Those increases were determined before the 25% was determined. We knew they were there.

Docket No. 11608.

EXHIBIT No. 3.

Witness, Hoffelder.
Defendants' Date 9-17-1920.
Reporter, Flannery.

Docket 11608.

Statement Showing Rates on Brick, Carloads, Effective June 25, 1918, from Sheridan, Wyo., to Clearmont, Wyo., as Compared with Rates to Other Points in the Same Territory.

From—	To—	Distance.	Rates in cents per 100 pounds.
Sheridan, Wyo	Clearmont, Wyo	38	7
Sheridan, Wyo	Aberdeen, Mont	32	8
Sheridan, Wyo	Littlehorn, Mont	48	10
Sheridan, Wyo	Parkman, Wyo	26	6
Sheridan, Wyo	Wyola, Mont	38	9
Sheridan, Wyo	Ranchester, Wyo	16	5
Sheridan, Wyo	Alger, Wyo	10	4
Sheridan, Wyo	Dietz, Wyo	5	4
Sheridan, Wyo	Monarch, Wyo	11	4
Lovell, Wyo	Hooker, Wyo	3	4
Lovell, Wyo	Kane, Wyo	10	5
Lovell, Wyo	Himes, Wyo	20	7
Lovell, Wyo	Spence, Wyo	26	7

Lovell, Wyo	Stucco, Wyo	30	8
Lovell, Wyo	Greybull, Wyo	38	8
Lovell, Wyo	Basin Shale Works, Spur, Wyo	43	8
Lovell, Wyo	Basin, Wyo	46	9
Lovell, Wyo	Manderson, Wyo	54	10
Worland, Wyo	Colter, Wyo	5	5
Worland, Wyo	Neiber, Wyo	9	5
Worland, Wyo	Catham, Wyo	15	7
Worland, Wyo	Kirby, Wyo	21	7
Worland, Wyo	Lucerne, Wyo	25	8
Worland, Wyo	Thermopolis, Wyo	33	8
Worland, Wyo	Greybull, Wyo,	35	8
Billings, Mont	Hardin, Mont	58	8

Tariff Authority, C., B. & Q. I. C. C. 10610.

Interstate Commerce Commission.

Docket 11608.

Witness, Reid.
Defendant's Date, 9-17-1920.
Reporter, Flannery.

Summary Analysis of Traffic of the Wyoming Railway for the Year Ending July 31, 1919.

Index No.	Commodity.	Tons.	Revenue.	Percentage to total. Tons.	Percentage to total. Revenue.	Ton-miles.	Revenue per ton-mile.
1	Wheat	1,000	$2,401.02	.0400	.0356	26,713	.0898
2	Corn	803	999.39	.0321	.0148	21,759	.0456
3	Oats	474	627.72	.0189	.0093	12,179	.0515
6	Other Mill Products	153	404.05	.0061	.0060	4,012	.1007
7	Hay, Straw and Alfalfa	880	1,148.43	.0502	.0352	22,744	.0505
10	Cottonseed and Products	917	1,292.36	.0367	.0191	25,346	.0510
11	Citrus Fruits	31	203.00	.0012	.0030	886	.2291
12	Other Fresh Fruits	59	256.86	.0024	.0038	1,682	.1526
13	Potatoes	257	707.62	.0103	.0104	7,165	.0988
16	Other Products of Agriculture	522	217.08	.0209	.0032	8,026	.0270
	Total Products of Agriculture.	5,096	$8,257.53	.2038	.1222	130,512	.0633
17	Horses and Mules	256	$435.83	.0102	.0065	7,296	.0597
18	Cattle and Calves	6,685	11,004.99	.2674	.1629	190,187	.0579

19	Sheep and Goats	3,847	7,716.00	.1539	.1143	109,532	.0704
20	Hogs	241	528.20	.0096	.0078	6,625	.0797
26	Wool	797	4,202.64	.0319	.0622	22,742	.1848
	Total Products of Animals	11,826	$23,887.66	.4730	.3537	336,382	.0710
30	Bituminous Coal	717	706.38	.0287	.0104	19,449	.0363
38	Salt	285	1,141.81	.0114	.0169	8,149	.1401
	Total Products of Mines	1,002	$1,848.19	.0401	.0273	27,598	.0669
40	Logs, Posts and Poles	79	317.56	.0031	.0048	2,259	.1406
43	Lumber, Timbers, etc.	2,224	8,222.66	.0890	.1216	56,019	.1468
	Total Products of Forests	2,303	$8,540.22	.0921	.1264	58,278	.1446
45	Refined Petroleum	749	$2,996.55	.0300	.0444	21,008	.1426
47	Sugar, Sirup, etc.	58	303.31	.0023	.0045	1,581	.1918
51	Bar and Sheet Iron	181	777.32	.0072	.0116	5,177	.1501
53	Castings, Machinery, etc.	56	305.53	.0023	.0045	1,589	.1923
54	Cement	460	1,485.32	.0184	.0219	13,098	.1134
55	Brick	231	462.69	.0092	.0069	6,578	.0703
56	Lime	57	232.88	.0023	.0034	1,617	.1440
58	Agricultural Implements	20	108.00	.0008	.0015	570	.1895
59	Automobiles	48	451.45	.0019	.0067	1,359	.3322

Summary Analysis of Traffic of the Wyoming Railway.—Continued.

Index No.	Commodity.	Tons.	Revenue.	Percentage to total. Tons.	Percentage to total. Revenue.	Ton-miles.	Revenue per ton-mile.
60	Household Goods	311	858.18	.0124	.0127	7,337	.1170
62	Beverages	84	392.33	.0034	.0059	2,395	.1637
66	Chemicals and Explosives	23	184.10	.0009	.0027	661	.2785
68	Canned Goods	23	128.54	.0009	.0019	651	.1975
69	Other Manufactures & Misc'l.	472	2,316.45	.0189	.0343	13,163	.1760
	Total Manufactures & Misc'l...	2,773	$11,002.65	.1109	.1629	76,784	.1432
	Grand Total Carload Traffic...	23,000	$53,536.25	.9200	.7911	629,554	.0849
70	Merchandise, all L. C. D.	1,999	$14,001.74	.0800	.2073	54,243	.2581
	Grand Total, Carload & L. C. L.	24,999	$67,537.99	.....	.....	683,797	.0987

EXHIBIT No. 5.

Interstate Commerce Commission.

Docket No. 1108.

Witness, Reid.
Defendants' Date, 9-17-1920.
Reporter, Flannery.

Supplementary Report of Freight Commodity Statistics of the Wyoming Railway for the Year Ending December 31, 1919.

Index No.	Commodity.	No. of carloads.	No. of tons.	Revenue.	Percentage to total. Cars.	Tons.	Revenue.
1	Wheat	26	1,000	$2,401.02	.0176	.0400	.0356
2	Corn	23	803	999.39	.0156	.0321	.0148
3	Oats	16	474	627.72	.0108	.0189	.0093
6	Other Mill Products	6	153	404.05	.0041	.0061	.0060
7	Hay, Straw and Alfalfa	74	880	1,148.43	.0502	.0352	.0170
10	Cottonseed and Products	34	917	1,292.36	.0230	.0367	.0191
11	Citrus Fruits	2	31	203.00	.0014	.0012	.0030
12	Other Fresh Fruits	3	59	256.86	.0020	.0024	.0038
13	Potatoes	15	257	707.62	.0101	.0103	.0104
16	Other Products of Agriculture	13	522	217.08	.0089	.0209	.0032
	Total Products of Agriculture	212	5,096	$8,257.53	.1437	.2038	.1222

Supplementary Report of Freight Commodity Statistics.—Continued.

Index No.	Commodity.	No. of carloads.	No. of tons.	Revenue.	Percentage to total. Cars.	Tons.	Revenue.
17	Horses and Mules	22	256	$435.83	.0149	.0102	.0065
18	Cattle and Calves	560	6,685	11,004.99	.3797	.2674	.1629
19	Sheep and Goats	350	3,847	7,716.00	.2373	.1539	.1143
20	Hogs	28	241	528.20	.0189	.0096	.0078
26	Wool	52	797	4,202.64	.0353	.0319	.0622
	Total Products of Animals	1,012	11,826	$23,887.66	.6861	.4730	.3537
30	Bituminous Coal	23	717	$706.38	.0156	.0287	.0104
38	Salt	12	285	1,141.81	.0081	.0114	.0169
	Total Products of Mines	35	1,002	$1,848.19	.0237	.0401	.0273
40	Logs, Posts and Poles	4	79	$317.56	.0027	.0031	.0048
43	Lumber	71	2,224	8,222.66	.0481	.0890	.1216
	Total Products of Forests	75	2,303	$8,540.22	.0508	.0921	.1264
45	Refined Petroleum	35	749	$2,996.55	.0237	.0300	.0444
47	Sugar	3	58	303.31	.0020	.0023	.0045
51	Bar, Sheet & Struct. Iron	7	181	777.32	.0047	.0072	.0116

53	Castings, Machinery, Boilers.....	3	56	305.53	.0020	.0023	.0045
54	Cement	12	460	1,485.32	.0081	.0184	.0219
55	Brick	9	231	462.69	.0061	.0092	.0069
56	Lime and Plaster.....	3	57	232.88	.0020	.0023	.0034
58	Agricultural Implements	2	20	108.00	.0014	.0008	.0015
59	Automobiles	8	48	451.45	.0054	.0019	.0067
60	Household Goods & S. H. Furn.....	29	311	858.18	.0197	.0124	.0127
62	Beverages	5	84	392.33	.0034	.0034	.0059
66	Chemicals & Explosives.....	2	23	184.10	.0014	.0009	.0027
68	Canned Goods	1	23	128.54	.0007	.0009	.0019
69	Other Manufactures & Misc'l.....	22	472	2,316.45	.0149	.0189	.0343
	Total Manufactures & Miscellaneous	141	2,773	$11,002.65	.0955	.1109	.1629
	Grand Total, Carload Traffic..	1,475	23,000	$53,536.25	....	.9200	.7911
70	Merchandise, all L. C. L.....	....	1,999	$14,001.74	....	.0800	.2073
	Grand Total, Carload & L. C. L.	1,475	24,999	$67,537.99	....	....	....

EXHIBIT No. 6.

Interstate Commerce Commission.

Docket No. 11608.

Witness, Reid.
Defendant's Date, 9-17-1920.
Reporter, Flannery.

Supplementary Report of Freight Commodity Statistics of the Wyoming Railway, for the Year Ending December 31, 1919.

Index No.	Commodity.	State traffic. Tons.	State traffic. Revenue.	State traffic. Per cent rev.	Interstate traffic. Tons.	Interstate traffic. Revenue.	Interstate traffic. Per cent rev.
1	Wheat	122	286.31	.1192	878	$2,114.71	.8808
2	Corn	20	46.00	.0461	783	953.39	.9539
3	Oats	168	284.97	.4540	306	342.75	.5460
6	Other Mill Products	25	40.00	.0990	128	364.05	.9010
7	Hay, Straw & Alfalfa	57	73.08	.0636	823	1,075.35	.9364
10	Cottonseed Products	92	108.32	.0838	825	1,184.04	.9162
11	Citrus Fruits	....	.....	.....	31	203.00	1.00
12	Other fresh fruits	40	152.08	.5921	19	104.78	.4079
13	Potatoes	35	98.34	.1390	222	609.28	.8610
16	Other Products of Agriculture	522	217.08	1.00	....	.....	.....
	Total Products of Agriculture.	1,081	$1,306.18	.1582	4,015	$6,951.35	.8418

17	Horses	24	$39.00	.0895	232	$396.83	.9105
18	Cattle and Calves	249	394.91	.0359	6,436	10,610.08	.9641
19	Sheep	33	58.50	.0076	3,814	7,657.50	.9924
20	Hogs	51	80.00	.1515	190	448.20	.8485
26	Wool	....	.....	.....	797	4,202.64	1.00
	Total Products of Animals....	357	$572.41	.0240	11,469	$23,315.25	.9760
30	Bituminous Coal	686	$647.95	.9172	31	$58.43	.0828
38	Salt	....	.....	.....	285	1,141.81	1.00
	Total Products of Mines.....	686	$647.95	.3504	316	$1,200.24	.6494
40	Logs, Posts, Poles	....	.....	.....	79	$317.56	1.00
43	Lumber	220	404.01	.0492	2,004	7,818.65	.9508
	Total Products of Forests.....	220	$404.01	.0473	2,083	$8,136.21	.9527
45	Refined Petroleum	725	$2,901.07	.9682	24	$95.48	.0318
47	Sugar, Sirup, etc.	58	303.31	1.00	....	.....	.....
51	Bar, Structural iron & Pipe	....	.....	.....	181	777.32	1.00
53	Castings, machinery & Boilers	....	.....	.....	56	305.53	1.00
54	Cement	....	.....	.....	460	1,485.32	1.00
55	Brick	179	358.47	.7531	52	104.22	.2469
56	Lime and Plaster	....	.....	.....	57	232.88	1.00

Supplementary Report of Freight Commodity Statistics.—Continued.

Index No.	Commodity.	State traffic. Tons.	State traffic. Revenue.	State traffic. Per cent rev.	Interstate traffic. Tons.	Interstate traffic. Revenue.	Interstate traffic. Per cent rev.
58	Agricultural Implements	....	.....	.....	20	108.00	1.00
59	Automobiles	....	.....	.....	48	451.45	1.00
60	Household Goods	41	93.32	.1088	270	764.86	.8912
62	Beverages	52	235.72	.6266	32	156.61	.3734
66	Chemicals and Explosives	10	60.00	.3259	13	124.10	.6740
68	Canned Goods	....	.....	.....	23	128.54	1.00
69	Other Manufactures & Misc'l.	144	694.53	.2999	328	1,621.92	.7001
	Total Manufactures & Miscellaneous	1,209	$4,646.42	.4224	1,564	$6,356.23	.5776
	Grand Total Carload Traffic	3,553	$7,576.97	.1405	17,447	$45,959.28	.8595
70	Merchandise, all L. C. D.	765	$4,034.88	.2889	1,234	$9,966.86	.7111
	Grand Total Carload and L. C. L.	4,318	$11,611.85	.1720	20,681	$55,926.14	.8280

EXHIBIT No. 7.

Interstate Commerce Commission.

Docket No. 11608.

Witness, Belt.
Defendants' Date, 9-17-1920.
Reporter, Flannery.

Trial Balance, Wyoming Railway Company, December 31, 1920.

	Total.	Liabilities or assets.		Profit & loss, 12 mos.	
		Fixed.	Current.	Reserves, suspense accts.	Revenue operation.
Capital Stock	$1,000,000.00	$1,000,000.00	.....	.....	.....
Bonds	536,000.00	536,000.00	.....	.....	.....
Current Liabilities	117,452.70	.....	$117,452.70	.....	.....
Unadjusted Credits	2,709.54	.....	.....	2,709.54	.....
Revenue	92,897.11	.....	.....	.....	92,897.11
	$1,749,059.35	$1,536,000.00	$117,452.70	$2,709.54	$92,897.11
Ways and Structures	$1,388,267.25	1,388,267.25	.....	.....	.....
Equip. & Gen'l Invest.	126,715.86	126,715.86	.....	.....	.....
Supplies	3,211.83	.....	3,211.83	.....	.....
Cash	5,514.21	.....	5,514.21	.....	.....
Bills & Accts. Rec.	13,991.06	.....	13,991.06	.....	.....

Trial Balance.—Continued.

	Total.	Liabilities or assets.		Profit & loss, 12 mos.	
		Fixed.	Current.	Reserves, suspense accts.	Revenue operation.
Due from Ry. Agents.....	[7,165.09]*	.....	[7,165.09]*	.....	.....
Unadjusted Debits.....	60,160.45	.....	.....	60,160.45	.....
Operating Expense.....	72,618.86	.....	.....	.....	72,618.86
Income Debits	45,196.14	.....	.....	45,196.14	.....
Profit and Loss.....	40,548.78	.....	.....	40,548.78	.....
	$1,749,059.35	$1,514,983.11	$15,552.01	$145,905.37	$72,618.86

(Here follows statement marked page 302.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

ARCHIVE

303 Mailed by Interstate Commerce Commission May 7, 1921.

Filed by Interstate Commerce Commission May 7, 1921. H. H.

Interstate Commerce Commission.

No. 11608.

PIONEER LUMBER COMPANY et al.

v.

DIRECTOR GENERAL, as Agent; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.

Submitted —— —, 1921. Decided —— —, 1921.

Rates on lumber and lumber products from points in Idaho, Montana, and Washington to Ucross and Buffalo, Wyo., found not unreasonable, but unduly prejudicial. Rates on brick from Sheridan, Wyo., to Buffalo found not unreasonable. Reparation denied.

J. B. Campbell and R. S. Brown for complainants.

F. G. Dorety and R. J. Hagman for all defendants except Wyoming Railway, Burt Griggs and Alden, Latham & Young for Wyoming Railway.

Report Proposed by F. W. McM. Woodrow, Examiner.

Complainants, The Pioneer Lumber Company and The Buffalo Lumber Company, are corporations engaged in the lumber and fuel business with offices at Buffalo, Wyo. By complaint filed July 7, 1920, they allege that the rates charged on interstate carload shipments of lumber and lumber products from points in the states of Idaho, Montana and Washington, to Buffalo and Ucross, Wyo., and on intrastate shipments of brick from Sheridan, Wyo., to Buffalo were unreasonable, unjustly discriminatory and unduly prejudicial in violation of sections 1, 2 and 3 of the act to regulate commerce and section 10 of the Federal control act. Reparation is sought, and reasonable and non-prejudicial rates are requested for the
304 future on all interstate shipments. Rates will be stated herein in amounts per 100 pounds.

The shipments moved over the lines of the defendants and apparently the applicable rates were collected based upon the Clearmont, Wyo., combination. Complainants seek reparation down to the basis of the rates that would have been applicable if the increases provided in General Order No. 28 of the Director General had been applied to the total rates and not to the separate factors thereof. At the hearing it was claimed that that should be the measure of

reparation during Federal control but that subsequent thereto reparation ought to be based upon the rates contemporaneously in effect to Clearmont, which complainants contend were and are reasonable for application to Buffalo and Ucross. The main issue, aside from reparation, is whether or not the Clearmont rates shall be for the future extended to Buffalo and Ucross. At the hearing no testimony was given to support the allegation as to the violation of section 2.

Buffalo and Ucross are located on the Wyoming Railway Company. It connects at Clearmont with the main line of the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington, and extends southwesterly for a distance of 28.6 miles. Buffalo is at its terminus and is a town of about 1,800 inhabitants. Ucross is 10 miles from Clearmont and has a population of about 100. The lumber and lumber products rates in the northwest have for many years been blanketed both as to points of origin and destination. In the so-called Northwest Lumber Cases, 14 I. C. C., 1, 23, 41, 51, decided June 2, 1908, the Commission prescribed,
305 among other things, reasonable rates from points of origin to Clearmont which is embraced in the so-called "blanket territory." The respective specific factors to Clearmont here in issue on lumber and lumber products are the rates thus prescribed by the Commission, as increased under General Order No. 28, and Increased Rates, 1920, 58 I. C. C. 220. The Wyoming Railway Company was organized in 1910, construction was commenced in 1913 and completed in 1918. The Clearmont rates have not been extended by the Burlington to stations located on the Wyoming Railway Company, therefore, the Wyoming Railway Company charges its local rates from Clearmont to destinations.

The first issue presented is: Did increasing each factor under General Order No. 28 result in unreasonable rates? General Order No. 28 provided that rates on lumber and lumber products should be increased 26 per cent, maximum 5 cents, and that rates on brick should receive a flat increase of 2 cents. By applying these increases to each factor instead of the combined factors there resulted an additional charge of 4 cents to Buffalo and 2 cents to Ucross on lumber and lumber products and of 2 cents on brick to Buffalo. Complainants claim that the Director General never intended that the increases should be applied to each factor, and that this is shown by his freight rate authority No. 10 of July 2, 1918, which directed among other things that the tariffs be revised so that the increases in General Order No. 28 would be applicable to the total rates. The Wyoming Railway Company increased its rates under General Order No. 28 and the record shows that on June 29, 1918, it was released
306 from Federal control. Its rates were not changed in accordance with freight rate authority No. 10. With respect to the rates on brick complainants rely solely upon the fact that each factor of the combination was increased under General Order No. 28. The reasonableness of the rates in question is not determinable solely from the method of their construction. Defendants show that the rates on brick assailed compare favorably with other similar

rates in this general territory. Following National Supply Co. v. C. M. & St. P. Ry. Co., 57 I. C. C. 739; Pine Plume Lumber Co. v. D. G. and A. C. L. R. R. Co., et al., 59 I. C. C. 371, the Commission should find that the rates on brick assailed were not unreasonable.

The Coast group rate to Clearmont June 25, 1918 on lumber was 45 cents and from the Spokane group the rate was 38 cents. From Clearmont to Buffalo the rate was 20 cents, making combination rates of 65 and 58 cents respectively. The present Coast Group rate, is 81½ cents and the present Spokane rate is 72½ cents. The factors up to Clearmont are 56½ and 47½ cents respectively. Complainants filed exhibits which showed the ton-mile and car-mile earnings on the various lumber shipments. These earnings were compared with earnings that would have accrued if shipments had moved to other destinations in the blanket which took the Clearmont rates, for example, there was a shipment of fir lumber from National, Wash., to Buffalo, a distance of 1,270 miles that earned 10.2 mills per ton-mile and under the present rates it would have earned 12.8 mills per ton-mile. This shipment, if it had moved to Spearfish, S Dak., a distance of 1,556 miles would have produced 5.7 mills per ton-mile and would not produce 7.2 mills per ton-mile under
307 the present blanket rate. The rates to Birds, Colo., a distance of 1,676 miles, on this shipment would have earned 5.3 mills and 6.7 mills per ton-mile, respectively. Complainants show also *so* that the factor up to Clearmont on this shipment produced 7.2 mills per ton-mile and that the factor from Clearmont to Buffalo earned 14.03 mills per ton-mile. They point out that the average per ton-mile earnings for the various roads on all traffic during 1918 were as follows:

Burlington	7.38	mills.
Milwaukee	8.4	"
Great Northern	8.7	"
Northern Pacific	8.19	"

The present 81½ cent rate from Everett, Wash., to Buffalo, a distance of 1,128 miles, based on a load of 63,760 pounds, the average load of fir lumber as given in Increased Rates, 1920, supra, by the West Coast Lumbermen's Association, produces per car-mile earnings of 46.06 cents, while the present Everett-Clearmont rate of 56½ cents produced per car-mile earnings of 32.77 cents. If the Clearmont rate were granted Buffalo, the per car mile earnings would be 31.93 cents. The rate from Everett to Birds earns per car-mile revenue of 21.45 cents.

The defendants maintain that complainants' exhibits are of little value because blanket rates are compared with blanket rates and the specific earnings vary with the distances used. They contend that complainants should show the average point of origin and the average point of destination in the respective blankets. They further contend that the factors of the lumber rates up to Clearmont were Commission made rates, established in 1908, as increased by General Order No. 28 and under Increased Rates, 1920, supra, and therefore, are in and of themselves reasonable.

308 Defendants show that the Wyoming Railway Company lost in the operation of its railroad $46,408.72 in 1918 and $24,917.89 in 1919; that no interest had been paid on its bonds for nearly three years; that no dividends have ever been paid on its stock; that its officers and directors have received no salaries; that although only 28.6 miles in length Buffalo is nearly a thousand feet higher than Clearmont and that the road is operated through a sparsely settled country with no present expectation of increased traffic.

A careful weighing of this evidence compels the conclusion that the combination rates on lumber were not and are not unreasonable per se. Carriers, however, are in duty bound not only to charge reasonable rates but those rates must also not result in an undue or unreasonable preference or advantage to any locality. The remaining question, therefore, is, did the failure of the defendants to extend the blanket rates to points on the line of the Wyoming Railway Company result in undue or unreasonable prejudice to complainants?

The complainant, The Pioneer Lumber Company, has lumber yards at Sheridan and Ucross as well as at Buffalo, while the complainant, The Buffalo Lumber Company, has yards at Buffalo and Kaycee, Wyo., which is about 60 miles south of Buffalo. Sheridan is 38 miles north of Buffalo by dirt road. The testimony shows that it is customary for farmers who live within 8 miles of Buffalo to buy their lumber in Buffalo, but those who live farther away than that make their purchases at Sheridan. There is a divide known as Tunnel Hill about midway between Sheridan and Buffalo and save for the more favorable freight rates to Sheridan the record
309 shows that Buffalo would probably receive the business of all those who live south of the divide. Ulm, Wyo., is on the Burlington just west of Clearmont. Competitors of the Pioneer Lumber Company located at those points are enabled by reason of their lower rates to secure trade which otherwise would go to Ucross. Casper, Wyo., is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee and takes the blanket rate. The Buffalo Lumber Company has a yard *at* Kaycee, Wyo., which is not served by railroad, and which is approximately half way across country, between Buffalo and Casper. This complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about 10 miles south of Kaycee and the Buffalo Lumber Company insist that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

The complainants point out that Spearfish and Deadwood, S. Dak. are located on the branch line of the Burlington that connects with the main line at Edgemont, S. Dak. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Complainants show that Birds, about 400 miles more distant from points of origin than Clearmont, located upon the Great Western Railway an independent line 82

miles long, takes the blanket rates. They contend that the fact that the defendants voluntarily apply the blanket rates to these
310 points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming Railway results in unjust discrimination and undue prejudice.

The defendants say that they only extend blanket rates to points on independent short lines when compelled to do so by competition. The Burlington extends the blanket rate from a point about 70 miles south of Billings, Mont., for a distance of about 600 miles through Alliance, Nebr., to Denver, Colo. The defendants assert that this blanket was established to meet competition on lumber from California via the Harriman lines. At that time the Big Horn Division of the Burlington had not been completed and to compete with the Union Pacific at Denver, the Burlington had to haul lumber received from the Great Northern and the Northern Pacific via its Sheridan route through Alliance. The defendants claim that if the former rate had not been blanketed fourth section violations would have been created along the Sheridan line. This reason would not account for the Burlington's extending the blanket to Spearfish an additional haul from Edgemont, as seen above, of 130 miles. The defendants explain that conditions with respect to Birds are entirely different and that competitive reasons compelled the extension of the blanket rates to Birds. They show that the Great Western has two connections with the Union Pacific, one at Eaton, Colo., and one at Kelim, Colo.; two connections with the Colorado and Southern, one at Loveland, Colo., and one at Windsor, Colo., and the connection with the Burlington at Longmont, Colo. They contend that there is no relation between the Birds and the Buffalo situa-
311 tions.

If a trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to points located on its branch line why should not a shipper situated on an independant branch line connecting with this blanketed stretch of the main line be entitled to the same blanket rate especially where the haul over the independent branch line is not in excess of the average haul over the trunk line's own branch lines? The defendants say that it is cheaper to perform a given service for equal distances between points located on a trunk line or on a trunk line's branch line, than between points located on an independent line. This may be true but it is difficult to reach the conclusion that it is cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Railway Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4½ times greater than that to Buffalo.

Trunk lines should not be permitted arbitrarily to extend the blanket rates to all points on their branch lines regardless of distance and at the same time refuse to extend those rates to points, not more distant from the main line than Buffalo, on independent lines

situated as is the Wyoming Railway Company. The question of divisions, whether or not the Wyoming Railway Company should receive its full local or only part thereof, does not enter into this case.

312 The equities demand that points located on the Wyoming Railway Company be accorded the Blanket lumber rates, provided the Burlington continues to extend those rates to points such as Spearfish and Deadwood on its Edgemont Division.

No competition is shown of record between complainants and lumber dealers situated on the Edgemont division. However, these localities might be unduly preferred within the meaning of section 3. The Commission said in Three Lakes Lumber Co. v. W. W. Ry. Co., 61 I. C. C. 408, 414:

The inhibition of Section 3 of the interstate commerce act against undue prejudice applies to localities as well as to shippers at those localities. A shipper who contemplates locating a mill at Machias, for example, has a right to rely upon an analagous basis of rates being published in defendants' tariffs in determining the advantages of locating at that point.

The Commission should find that the interstate rates on lumber and lumber peoducts and the intrastate rates on brick here in issue were not unreasonable but that the failure to extend the blanket lumber rates to Buffalo and Ucross on the line of the Wyoming Railway Company, while at the same time maintaining the blanket rates to Clearmont and Sheridan, is unduly prejudicial. No damage is shown, so reparation should be denied. An appropriate order should be entered.

313 In the District Court of the United States, District of Wyoming.

In Equity.

#1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Stipulation.

It is hereby stipulated by and between the attorney for the above named plaintiff and by the attorney for the above named defendant, that the time for the filing of the record of said cause with the Clerk of the Supreme Court of the United States and the docketing of said cause by said Clerk be extended until and including Tuesday, the sixteenth day of May, A. D. 1922.

Dated 29th day of March, 1922.

A. C. CAMPBELL,
Attorney for the Plaintiff.
ALBERT D. WALTON,
Attorney for the Defendant.

Endorsements: No. 1235 Civil. In the District Court of the United States, District of Wyoming. Wyoming Railway Company, Complainant, vs. United States, Defendant. Stipulation. #1235 in Equity. Filed March 30, 1922. Charles J. Ohnhaus, Clerk.

314 In the District Court of the United States, District of Wyoming.

In Equity.

#1235.

WYOMING RAILWAY COMPANY, Complainant,

vs.

UNITED STATES, Defendant.

Order.

On this day came the above named plaintiff, the Wyoming Railway Company, by its attorney, A. C. Campbell, also came the United States by its attorney, A. D. Walton, and present the Stipulation wherein and whereby it is agreed that the time for the filing of the record of said cause with the Clerk of the Supreme Court of the United States and the docketing of said cause by said Clerk be extended to and including Tuesday, the sixteenth day of May A. D. 1922. Whereupon it is

Ordered, that the time for the filing of the record of said cause with the Clerk of said Court and the docketing of said cause by said Clerk be extended to and including Tuesday, the sixteenth day of May, A. D. 1922.

Dated 30 day of March 1922.

T. BLAKE KENNEDY,
Judge.

Endorsements: No. 1235 Civil. In the District Court of the United States District of Wyoming. Wyoming Railway Company, Complainant, vs. United States, Defendant. Order. #1235 in Equity. Filed March 30, 1922. Charles J. Ohnhaus, Clerk.

315 UNITED STATES OF AMERICA,
District of Wyoming, ss:

I, Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming, do hereby certify the above and foregoing to be a true, correct and complete transcript and copy of the record and proceedings, and of all thereof, as directed by precipe for transcript, in a certain cause lately in said court pending wherein Wyoming Railway Company is complainant and United States is defendant, as full and complete as the same still remains on file and of record in my office at Cheyenne, Wyoming.

In testimony to the above, I do hereto sign my name and affix the seal of the said court at Cheyenne, Wyoming, in said District, this tenth day of April, A. D. 1922.

[Seal of the United States District Court, District of Wyoming.]

CHARLES J. OHNHAUS,
Clerk of the United States District Court for the District of Wyoming.

Endorsed on cover: File No. 28,844. Wyoming D. C. U. S. Term No. 338. Wyoming Railway Company, appellant, vs. The United States of America and Interstate Commerce Commision. Filed April 19th, 1922. File No. 28,844.

FILE COPY

MAR 19 1
WM. R. STAN

NO. ~~335~~ 38

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

18

WYOMING RAILWAY COMPANY,
Appellant.

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

Appeal from the District Court of the United States for the District of Wyoming.

BRIEF AND ARGUMENT FOR APPELLANT.

W. T. ALDEN,
COUNSEL FOR APPELLANT.

C. R. LATHAM,
H. P. YOUNG,
CHAS. MARTIN,
H. C. LUTKIN,
Of Counsel.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

SUBJECT INDEX.

PAGE

Argument 12

I. The courts may set aside an unlawful order of the Interstate Commerce Commission..... 12

II. The order of the Interstate Commerce Commission exceeds its powers under Section 3 of the Interstate Commerce Act..... 12

(*a*) The appellant does not participate in any discrimination 13

(*b*) No undue prejudice was shown..... 18

III The order of the District Court should be reversed 24

Specification of errors..... 11

Statement of the case..... 1

Cases Cited.

Central R. Co. of N. J. v. United States, 257 U. S., Dec. 5, 1921, 66L. Ed. 91.....12, 14

East Term, etc., R. Co. v. Interstate Com. Com., 181 U. S. 1..... 17

Interstate Com. Com. v. Cincinnati, etc., R. Co., 124 Fed. 624 19

Interstate Com. Com. v. Alabama Midland, 168 U. S. 144 19

Interstate Com. Com. v. Diffenbaugh, 222 U. S. 42.12, 22

Interstate Com. Com. v. Great Western, 209 U. S. 108 19

Louisiana & P. R. Co. v. United States, 209 Fed. 244 12

Phila. & Reading Ry. Co. v. United States, 240 U. S. 334 21

Skinner & Eddy v. United States, 249 U. S. 557.... 12

St. Louis, etc., Ry. Co. v. United States, 217 Fed. 80. 14

United States v. B. & O. Ry. Co., 231 U. S. 274..... 20

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

WYOMING RAILWAY COMPANY, *Appellant*, vs. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.	Appeal from the District Court of the United States for the District of Wyoming.

BRIEF AND ARGUMENT FOR APPELLANT.

I.

STATEMENT OF THE CASE.

The Wyoming Railway Company, appellant herein, filed its bill of complaint on its own behalf and on behalf of other carriers affected by the order of Interstate Commerce Commission, seeking to suspend and set aside the order of the Interstate Commerce Commission of November 3, 1921, in its Docket No. 11608, 64 ICC 485 (Rec. 1, 2, 17). The United States, appellee, filed a motion to dismiss the complaint for want of equity (Rec. 21). The Interstate Commerce Commission intervened (Rec. 21) and filed a formal answer (Rec. 22). Thereafter, on January 21, 1922, after hearing before Circuit Judge Lewis and District Judges Ryner and Kennedy, an order

was entered denying the application for a preliminary injunction and dismissing the bill without prejudice (Rec. 24, 25). The appeal is from that order.

The bill of complaint in substance makes the following allegations. The appellant is a common carrier engaged in the transportation of freight by railroad in interstate commerce (Rec. 2). It is a short line railroad, independently owned and operated, extending 28.6 miles from Clearmont, Wyoming, to Buffalo, Wyoming. Clearmont is its junction point with the Chicago, Burlington & Quincy Railroad Company (hereinafter called the Burlington). Ucross, Wyoming, is a station on appellant's line ten miles from Clearmont. Buffalo and Ucross are not served by any other railroad (Rec. 4). Appellant's line of railroad was not completed until 1918. It has been operated at a loss, the operating deficit in 1918 being $46,408.72 and in 1919 $24,917.80 (Rec. 4, 176); no interest has been paid on its bonds for nearly three years; no dividends have ever been paid on the stock; its officers and directors have received no salaries; it operates through a sparsely settled country with no present prospect of increased traffic; it hauls over severe grades as Buffalo is nearly 1,000 feet higher than Clearmont (Rec. 4). Appellant made a freight rate on lumber from points in Idaho and other states to stations on its line by applying the rate applicable from point of origin to Clearmont, which is the junction point with the Burlington, and adding thereto its lawful published rates (or local) (Rec. 4). In 1920 Pioneer Lumber Company and Buffalo Lumber Company, engaged in the retail lumber business at Buffalo, filed a complaint with the Interstate Commerce Commission alleging that the rates charged by appellant and connecting carriers on interstate lumber shipments from other states to Buffalo and Ucross and on brick in carload lots from Sheridan, Wyoming to Buf-

falo were unreasonable, unjustly discriminatory and unduly prejudicial and asked for reparation and the establishment of lower interstate rates on lumber (Rec. 2, 38). Appellant and other defendant carriers therein answered and, after a hearing, the Commission made its report by Division 4 consisting of Commissioners Mayer, Daniels and Esch. (Rec. 3, 13, 64 ICC485.) In its report and order the Commission found that no evidence was offered in support of unjust discrimination and that the interstate rates on lumber and lumber products were not unreasonable, or otherwise unlawful, but that the failure of the appellant and connecting carriers to extend the blanket rates on lumber applicable to points on the Burlington to Buffalo and Ucross, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on the main line and branch lines of the Burlington or on independent connecting lines, is and for the future will be unduly prejudicial. (Rec. 3, 13, 17). By this order of November 3, 1921, appellant and connecting carriers, defendants therein, are required to establish, maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana and Washington, to Buffalo and Ucross, Wyoming, rates which do not exceed the rates contemporaneously maintained from the same points to Clearmont and Sheridan, Wyoming, and other points in the blanket territory on the line of the Burlington and independent connecting lines other than appellant. (Rec. 3, 4, 17). The Commission in its report admitted the existence of all the facts alleged in the bill. (Rec. 5.) This order is on the theory that all shippers and localities in the blanket territory are entitled to the blanket rates regardless of the finding of fact that the existing combination rates are not unjust, or unreasonable, or unjustly discriminatory. (Rec. 6.) Appellant does not participate in the transportation of lumber from Idaho, Mon-

tana and Washington to Clearmont, or any point on the lien of the Burlington within the blanket rate territory and has no power or authority to dictate what the rate shall be from producing points to points on said line. (Rec. 6.)

The bill then makes further allegations. The order of the Commission deprives appellant of its property without due process of law in violation of the Fifth Amendment. Appellant is operating at a loss and the present rates on lumber are not unreasonable, or unjustly discriminatory so that a reduction in rates will be confiscatory. No agreement has been made, or can be made with the Burlington and other trunk lines for a division of joint rates on lumber which will yield appellant sufficient to pay the cost of its service or a rate equal to the present local rate (Rec. 6). Appellant declines to permit other carriers to extend the blanket rates to points on its line as the service which it performs justifies higher rates to points on its line than to points on lines of other carriers. (Rec. 7.) The rate in question does not discriminate against either persons or localities; there is no competition between retail lumber dealers situate considerable distance apart in the territory involved. Appellant cannot be jointly or severally held responsible for any undue prejudice in connection with rates on lumber to points on lines of other carriers where it does not participate in the transportation. Irreparable damage will accrue from the enforcement of said order of the Commission for the reason that appellant will be required and compelled to transport lumber at rates which are lower than its present rates. (Rec. 9.) The order is in excess of the powers of the Commission. The Commission has applied erroneous rules of law in the proceedings and the order is arbitrary and void.

The bill prays that the order of the Commission be suspended and set aside. (Rec. 12.)

The report of the Commission (64 ICC 485, Rec. 13) states in part:

"Complainants, the Pioneer Lumber Company and the Buffalo Lumber Company are corporations engaged in the lumber and fuel business at Buffalo, Wyo. By complaint filed July 7, 1920, they allege that the rates charged since June 25, 1918, on interstate carload shipments of lumber and lumber products from points in Idaho, Montana, and Washington, to Buffalo and Ucross, Wyo., and on intrastate shipments of brick, in carloads, from Sheridan, Wyo., to Buffalo were unreasonable, unjustly discriminatory and unduly prejudicial. The prayer is for reparation and the establishment of interstate rates on lumber for the future. No evidence was offered in support of the allegation of unjust discrimination. Rates will be stated in amounts per 100 pounds.

Buffalo, with a population of 1,800, is the terminus of the Wyoming Railway, 28.6 miles southwest of Clearmont, Wyoming, the junction with the Chicago, Burlington & Quincy, hereinafter called the Burlington. Ucross, with a population of about 100, is also on the Wyoming ten miles southwest of Clearmont. The Wyoming was organized in 1910, but construction was not completed until 1918.

The shipments moved over defendants' lines and apparently the applicable rates were collected upon the Clearmont combination.

* * *

"The rates on lumber and lumber products in the northwest have, for many years, been blanketed both as to points of origin and destination. In the so-called *Northwest Lumber Cases* 14 I. C. C. 1, 23, 41, 51, decided June 2, 1908, we prescribed reasonable rates to Clearmont which is embraced in the so-called blanket territory. The components to Clearmont on lumber and lumber products here in issue are the rates thus prescribed increased under the general increases of 1918 and 1920.

* * *

The present coast-group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors

up to Clearmont are 56.5 and 47.5 cents, respectively. Complainants submitted exhibits which showed the ton-mile and car-mile earnings on shipments of lumber. These earnings were compared with earnings that would have accrued if the shipments had moved to other destinations in the blanket territory which took the same rates as Clearmont. For example, a shipment of fir lumber from National, Washington, to Buffalo, 1,270 miles, earned 10.2 mills per ton-mile and under the present rates it would earn 12.8 mills. If this shipment had moved to Spearfish, South Dakota, 1,556 miles, it would have produced 5.7 mills per ton-mile and would now produce 7.2 mills. The rates to Birds, Colorado, 1,676 miles, on this shipment would have yielded 5.3 mills and 6.7 mills, respectively. The factor up to Clearmont on this shipment yielded 7.2 mills and the factor from Clearmont to Buffalo, 14.03 cents per ton-mile. The present 81.5-cent rate from Everett, Washington, to Buffalo, 1,128 miles, based on a load of 63,760 pounds, the average load of fir lumber as given in Increased Rates, 1920, 58 I. C. C. 220, by the West Coast Lumbermen's Association, yields car-mile earnings of 46.06 cents, while the present Everett-Clearmont rate of 56.5 cents produces car-mile earnings of 32.77 cents. If the Clearmont rate were extended to Buffalo, the car-mile earnings would be 31.93 cents. The rate from Everett to Birds yields car-mile revenue of 21.45 cents.

Defendants maintain that these comparisons are of little value because blanket rates are compared with blanket rates and the specific earnings vary with the distances used. They contend that the average point of origin and the average point of destination in the respective blankets should be considered, and that as the factors up to Clearmont were prescribed by us in 1908, and subsequently increased under General Order No. 28 and the general increase of 1920, they are in and of themselves reasonable.

It appears that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919; no interest has been paid on its bonds for nearly three years; no dividends have ever been paid on its stock; its officers and directors have received no salaries. Its line is only 28.6 miles in length and

Buffalo is nearly 1,000 feet higher than Clearmont The road is operated through a sparsely settled country with no present prospect of increased traffic.

The above facts point to the conclusion that neither the combination rates nor the components thereof were or are unreasonable *per se*. The question remains as to whether the rates resulted in undue prejudice.

The Pioneer Lumber Company has lumber yards at Sheridan, 38 miles north of Buffalo by dirt road, and at Ucross as well as at Buffalo, while the Buffalo Lumber Company has yards at Buffalo and at Kaycee, Wyoming, about 60 miles south of Buffalo. The testimony shows that farmers within eight miles north of Buffalo generally buy their lumber in Buffalo, but those farther north buy at Sheridan. There is a divide known as Tunnell Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyoming, is on the Burlington just west of Clearmont. Competitors, of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyoming, is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad and is approximately halfway across country, between Buffalo and Casper. The complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about ten miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

Spearfish and Deadwood, South Dakota, are located on the branch line of the Burlington that connects with the main line at Edgemont, South Dakota. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles

distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colorado, about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming result in undue prejudice.

Defendants state that they extend blanket rates to points on independent short lines only when compelled to do so by competition. The Burlington extends the blanket rate from a point about 70 miles south of Billings, Montana, for a distance of about 600 miles through Alliance, Nebraska, to Denver, Colorado. This blanket was originally established to meet competition on lumber from California via the Harriman lines. At that time the Big Horn division of the Burlington had not been completed and to compete with the Union Pacific at Denver, the Burlington had to haul lumber received from the Great Northern and the Northern Pacific via its Sheridan route through Alliance. If the former rate had not been blanketed, fourth section violations would have been created along the Sheridan line. This would not account for the Burlington's extending the blanket to Spearfish, an additional haul from Edgemont of 130 miles. Competitive reasons compelled the extension of the blanket rates to Birds. The Great Western has two connections with the Union Pacific, one at Eaton, Colorado, and one at Kelim, Colorado; two connections with the Colorado & Southern, one at Loveland, Colorado, and one at Windsor, Colorado, besides the connection with the Burlington at Longmont, Colorado. Defendants contend that this competition distinguishes the situations at Birds and at Buffalo. But there is no such carrier competition at local main line and branch line stations on the Burlington in this blanket territory.

Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line

and also extends that rate to points located on its branch lines a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

"The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of Section 3 of the Interstate Commerce Act against undue prejudice applies to localities as well as to shippers at those localities. As was said in *Intermediate Rate Asso.* v. *Director General,* 61 I. C. C. 226, at page 233, respecting competition between localities:

Thriving communities, all in the same general section of the country, striving for population, industry and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related.

We find that the interstate rates assailed on lumber and lumber products were not and are not unreasonable; that during the period of Federal control the intrastate rates on brick here in issue were not unreasonable, or otherwise unlawful; but that the failure of defendants to extend the blanket rates on lumber to Buffalo and Ucross on the line of the Wyomnig Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for

the future will be unduly prejudicial. Complainants have not shown that they were damaged by any undue prejudice which may have existed in the past. Reparation is therefore denied."

The material parts of the order of the Commission (Rec. 17) are:

"It is ordered, that the above named defendants, according as they participate in the transportation, be, and they are hereby, notified anad required to cease and desist, on or before February 24, 1922, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of lumber and lumber products, in carloads, from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which exceed the rates made on the basis prescribed in the next succeeding paragraph hereof.

It is further ordered, that said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 24, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana and Washington to Buffalo and Ucross, Wyoming, rates which do not exceed the rates contemporaneously maintained by them on lumber and lumber products from the same points to Clearmont and Sheridan, Wyoming, and other points in the blanket territory on defendants' lines and independent connecting lines."

This is the order which is sought to be enjoined.

II.

SPECIFICATION OF ERRORS.

1. The District Court erred in overruling and denying the application of complainant (appellant) for a preliminary injunction, as prayed for in its bill of complaint.

2. The District Court erred in sustaining and granting the motion of the defendant, the United States (appellee), to dismiss the bill of complaint.

3. The District Court erred in dismissing the complainant's (appellant's) bill of complaint and entering a judgment in favor of the defendant (appellee) and against the complainant (appellant) for costs of suit.

The assignment of errors appears in the record at page 28. It is the contention of appellant that the bill of complaint sets forth a good cause of action, and, therefore, the District Court erred in denying the application for a preliminary injunction, in dismissing the bill and in entering a judgment in favor of the defendant.

ARGUMENT.

I.

The Courts have jurisdiction and power to set aside by injunction an order of the Interstate Commerce Commission when the order exceeds its statutory powers.

This principle has been announced in many cases and will not be controverted. As was said in the case of *Skinner & Eddy* v. *U. S.*, 249 U. S. 557, at page 562:

> "The contention is that the Commission has exceeded its statutory powers; and, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order.* * *"

The same rule of law is adopted in the following cases:

Louisiana & P. R. Co. v. *U. S.*, 209 Fed. 244.

Central R. Co. of N. J. v. *U. S.* 257 U. S., Dec. 5, 1921, 66 L. Ed. 91.

Interstate Commerce Com. v. *Diffenbaugh*, 222 U. S. 42.

II.

The order questioned in this case exceeds the power granted to the Interstate Commerce Commission by Sec. 3 of the Interstate Commerce Act or any other power of the Commission.

In view of the finding of the Commission that the rates on lumber and lumber products were not and are not unreasonable, and that no evidence was offered of unjust discrimination, no question arises under Section 1 or Section 2 of the Interstate Commerce Act.

The question is, then, whether the finding of the Commission that these rates are and for the future will be unduly prejudicial and the order on this finding that the Wyoming Railway Company, the appellant, and the other carriers participating in the shipments of lumber and lumber products from the west coast group and the Spokane group to Buffalo and Ucross, Wyoming, cease and desist from maintaining rates which exceed the blanket rates for this territory and for the future maintain and apply to Buffalo and Ucross on the Wyoming rates which do not exceed the blanket territory rates, is beyond the power of the Commission under Section 3 of the Interstate Commerce Act.

Paragraph (1) of Section 3 (February 3, 1887, 24 Stat. at L. 379) reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is to be noted that Section 3 provides that a carrier shall not give any undue preference to any person or locality, or subject any person or locality to any undue prejudice. The Wyoming Railway Company, the appellant, (hereinafter referred to as "the Wyoming") cannot be said to have given any such preference or occasioned any such prejudices. Buffalo and Ucross are served only by the Wyoming and the Wyoming does not serve any other points in the blanket territory (Map Rec. *Seq.* 154). The Wyoming was not a party to any joint rate or rates to other points in the blanket territory (Rec. 4) but treated all shipments moved by it in the same way,

that is, it added its local to the rate to Clearmont (Rec. 4), which was the blanket rate. Moreover, these were inbound shipments of lumber and lumber products originating on other roads.

This point was passed upon in the case of *St. Louis, etc., Ry. Co.* v. *U. S.*, 217 Fed. 80, where at page 83 Judge Baker says:

> "Against neither of the complainants in this case was there evidence before the Commission which could legally support a charge of discrimination on its part. * * * How can any one discriminate against another whom he does not serve and with whom he does not come in contact? We believe that, as a matter of law, the charge of discrimination cannot be brought by a locality against any railroad that does not serve that locality, either directly by its own route or by a joint agreement with other railroads for a through route and a joint rate."

Again in the recent case of *Central Railroad Co. of N. J.* v. *U. S.*, 257 U. S. 66, L. Ed. 91, known as the creosoting in transit case, the Court says:

> "What Congress sought to prevent by that section, as originally enacted, *was not difference between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers.* Neither the Transportation Act of 1920 nor any earlier amendatory legislation has changed in this respect the purpose or scope of Section 3." (Italics ours.)

As has been pointed out, the Wyoming does not discriminate between any of the persons or localities involved in this case, for it serves only Buffalo and Ucross. The other points are served by other carriers and the Wyoming does not reach them nor participate in through shipments or in joint rates to them.

The *Central Railroad Co. of N. J. case, supra,* involved an appeal from a suit brought in the Federal Court to

enjoin the enforcement of an order of the Interstate Commerce Commission on the ground that it exceeded the powers of the Commission and was arbitrary and void. The plaintiffs were the Central Railroad of New Jersey, the Pennsylvania and twenty-one other railroads. The order of the Commission was upon a petition of the American Creosoting Co., to which the plaintiffs were respondents. It appeared that the petitioner had a creosoting plant at Newark, New Jersey, served by the Central and the Pennsylvania. These carriers failed to establish the privilege known as creosoting in transit. It was claimed that this failure was in violation of Section 1 of the Act to Regulate Commerce and also in violation of Section 3. The Commission found that failure to establish this transit privilege was not unjust or unreasonable and denied relief under Section 1, but it found that the failure amounted to unjust discrimination under Section 3 and granted relief. The District Court denied the application for a preliminary injunction and on appeal this was reversed.

In its opinion this Court stated that the creosoting privilege was granted by certain roads in other states, each acting independently, and that joint rates were made by the respondents, including the creosoting privilege, on the lines of other carriers. The appellants did not participate in any way in establishing the transit privileges, but appellants did join in establishing joint rates over routes which passed through the points at which this privilege prevailed.

The order of the Commission declared that the twenty-three carriers, in so far as they participated in tariffs carrying joint rates through Newark, subjected the American Creosoting Co. to undue prejudice and disadvantage, and it directs these twenty-three carriers to avoid this undue prejudice without prescribing how the discrimination shall be removed.

The Court says in reaching its decision:

> "As to administrative orders operating *in futuro* the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and the finding that the discrimination is unjust is ordinarily a finding of fact. But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants and whether they can be required to cancel existing joint rates unless it is removed. No finding made by the Commission can prevent the review of such questions."

Again, the Court says:

> "Discrimination may, of course, be practiced by a combination of connecting carriers, as well as by an individual railroad; and the Commission has ample power under Section 3 to remove discriminations so practiced. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if every carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. If this were not so the legality or illegality of a carrier's practice would depend not on its own act but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all point rates, could afford to carriers the assurance that they were not in some way violating the provisions of Section 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act of 1920 nor any earlier amendatory legislation has changed in this respect the purpose or scope of Section 3."

In addition to holding that to constitute a violation of Section 3 a carrier must itself be a party to the unjust

discrimination, the Court indicates that the localities must be similarly situated, a point which is considered hereafter.

The decision in the *Central Railroad case, supra,* cites the case of *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1. This case arose on the complaint of the Board of Trade of Chattanooga, it being asserted by the commercial interest of that city that the carriers in making rates from eastern territory to Chattanooga discriminated against that city in favor of Nashville; that the traffic moved to Nashville through Chattanooga when it moved over certain southern lines, and that under the long and short haul clause (Section 4 of the Act) it was in violation of law for the carriers to apply lower rates to Nashville, a more distant point, than to Chattanooga, a near-by point. The facts showed that the rates to Nashville from this eastern territory were controlled by carriers operating over the northern route through Cincinnati to Nashville. The L. & N. did not reach Chattanooga and had no interest in that traffic. It was conceded that the action of the southern carriers in serving Chattanooga and applying lower rates to Nashville than to Chattanooga did not violate the long and short haul clause as it stood then. It was argued, however, by the Chattanooga shippers that under Section 3 it was unlawful for the southern carriers to apply lower rates to Nashville than to Chattanooga. Mr. Justice White, in discussing this, uses the following language, at page 18:

> "In a supposed case when, in the first instance, upon an issue as to the violation of the 4th section of the Act, it is conceded or established that the rates charged to the shorter distanced point are just and reasonable in and of themselves and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been

> forced upon the carriers by competition at the longer distanced point, it must result that a discrimination springing alone from a disparity of rates cannot be held, in legal effect, to be the voluntary act of the different carriers, and as a consequence the provisions of the 3d section of the Act, forbidding the making or giving of an undue or unreasonable preference or advantage will not apply."

Applying this test it is seen that the rate made to Sheridan, Birds and other points included in the blanket rate territory are beyond the control of the Wyoming, as shipments to these points did not move over the line of the Wyoming.

From the wording of Section 3 and the decisions it is clear that in order to constitute a violation of the prohibition of the section, a carrier must be responsible for unjust discrimination and undue prejudice and must be involved in making and maintaining the rates which constitute the alleged discrimination or prejudice.

It is submitted that the Wyoming does come within this rule. It only serves the points on its line and does not serve, either directly or as a connecting carrier, the other points in the blanket territory.

As a result the Commission exceeded its powers in finding undue prejudice and ordering the establishment and maintenance to Buffalo and Ucross of rates which do not exceed the rates contemporaneously maintained by other carriers to other points in the blanket territory.

Turning to the second point of invalidity of the order of the Commission, it is contended that undue prejudice does not exist in this situation.

In order to remove prejudice there must be a showing that the prejudice or disadvantage in question is undue or unreasonable. The decisions in construing Section 3 do not hold that all localities are entitled to the same

rates for the transportation of the same commodities merely because the mileage is the same or substantially the same. From the point of view of shippers this will, of course, be the natural rule. However, the situation and circumstances of the carriers involved must also be considered.

In the case of *Interstate Commerce Commission* v. *Great Western*, 209 U. S. 108, in construing Section 3, Mr. Justice Brewer, at page 119, quotes the following from the case of *Interstate Commerce Commission* v. *Alabama Midland*, 168 U. S. 144:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

As stated in the earlier case of *Interstate Commerce Com.* v. *B. & O.*, 145 U. S. 263, in construing Section 3:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and change of circumstances justifies an inequality of charge."

In passing on the question of preference between localities it was decided in *Interstate Commerce Commission* v. *Cincinnati, etc., R. Co.* 124 Fed. 624, that localities similarly situated in many respects are not necessarily entitled to equality of rates. Here it appeared that the

conditions are such at Norfolk and Richmond, Va., by reason of the large number of carrying lines, both rail and water, which enter such places, and the fact that they are in what is known as the "trunk line territory", as to create a very active competition on shipments from the West, and to justify the making of low rates on such shipments; and the fact that such low rates are made on through shipments from Chicago, St. Louis and East St. Louis by a material reduction from local tariff rates by the connecting lines west of the Ohio River, while substantially the local rates were charged on the same lines on through shipments from the same points to Wilmington, N. C., which is not within the trunk line territory but in the southern territory, and has fewer lines of transportation and less active competition, resulting in higher through rates to the latter place, although the length of haul is substantially the same, does not operate to give the Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue or unreasonable prejudice in violation of Section 3.

In the case of *U. S.* v. *B. & O. Ry. Co.*, 231 U. S. 274, it appeared that the Commission had found that the carriers were guilty of discrimination because they paid allowances for lightering sugar from the plant of Arbuckle Bros. within the lighterage limits, while at the same time refusing to pay an allowance for lightering sugar from the Federal Sugar Refining Co. located beyond the lighterage limits. The Court overruled the decision of the Commission and held that there was no evidence in the record of a substantial nature to warrant the finding of the Commission, in view of the fact that conditions and circumstances surrounding the movement from the Federal Sugar Refining Company differ from those surrounding the movements from the plant of Arbuckle Bros.

The case of *Phila. & Reading Ry. Co.* v. *U. S.*, 240 U. S. 334, deals with the following situation:

It appeared that the Commission had made an order that the Philadelphia & Reading was guilty of undue discrimination for the reason that it maintained a rate of $1.35 on cement from Evansville, Pa., to Jersey City. Evansville is a local point on the Reading, and the Reading extends from Evansville to Allentown where it delivers the traffic to some one of its numerous connections. It also appeared that these connecting lines maintained a rate of 80 cents from mills on their rails in the neighborhood of Evansville to Jersey City. However, the Philadelphia & Reading did not participate in this 80-cent rate. The Commission having condemned the $1.35 rate maintained by the Philadelphia & Reading, the Supreme Court set aside its decision, pointing out the fact that the $1.35 rate was not declared unreasonable nor was there any finding as to the unreasonableness, intrinsic or relative, as to the 80-cent rate. The following language appears in the decision at page 341:

> "If a universal rate of $1.35 could not justly be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule."

So far as the record discloses, or the Commission finds, the only evidence points definitely to the dissimilarity of situation and condition between points on the Wyoming and other points in the blanket rate territory. The Commission finds that the Wyoming operates a line of some twenty-eight miles, and that Buffalo is nearly 1,000 feet higher than Clearmont. The Commission also finds that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919, that no interest has been paid on the bonds of the Wyoming for nearly three

years, that no dividends have ever been paid on its stock, that its officers and directors have received no salary, and that it operates through a sparsely settled country with no present prospect of increased traffic. (Rec. 13, 15.) It also appears that the deficit of $24,917.89 in 1919 was suffered on gross receipts of the Wyoming for that year of $67,537.99, of which lumber and lumber products produced $8,540.22. (Rec. 170, 173.) The population of Buffalo is 1,800, and the population of Ucross is about 100.

It is apparent that Ucross and Buffalo and the shippers located at these points suffer from this condition, but as is stated in the case of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, at page 46:

> "The law does not attempt to equalize fortunes, opportunities or abilities."

The other places considered by the Commission in reaching its determination of undue prejudice are Sheridan and Clearmont on the main line of the Wyoming, Spearfish and Deadwood on a branch line of the Wyoming, and Birds on the Great Western, and independent line connecting with the Burlington and with the Union Pacific. (Rec. 13, 14.)

The situation at Birds may be eliminated for competitive reasons compel the extension of the blanket rates to Birds, as found by the Commission. (Rec. 16.)

The Commission also speaks of Ulm on the main line of the Burlington, and Casper on a division of the Burlington. (Rec. 15.) All of these points take the blanket rate, but none of them are served by the Wyoming, nor does traffic to them move over the Wyoming, nor does the Wyoming participate in joint rates to them.

The Commission says that:

> "It may be cheaper to perform a given service for equal distances to points on a trunk line or on

its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming to perform the service from Edgemont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than to Buffalo." (Rec. 16.)

There is no evidence in the record as to the cost of service from Edgemont to Spearfish or to any of the points in the blanket territory aside from those on the Wyoming. It follows, therefore, that the Commission had before it no evidence upon which to base a finding of undue prejudice; on the other hand, the evidence tended to show dissimilarity of situation and conditions between the Wyoming and the Burlington.

As was stated by the Commission (Rec. 16):

> "There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory."

so that the finding of the Commission as to undue prejudice is only based on undue prejudice as between localities.

In finding that neither the combination rates nor the components thereof were or are unreasonable, the Commission considered the situation and necessities of the Wyoming. Under the decisions referred to, in determining whether undue or unreasonable prejudice or disadvantage, as provided by Section 3, exists, consideration must also be given to the situation and circumstances of the Wyoming, and the finding of undue prejudice could only be based, erroneously, on the relation of the shippers at Buffalo and Ucross to the lumber dealers at other points in the blanket territory and not on the relation of the Wyoming to the carriers serving other points in the blanket territory.

As there was no showing of substantially similar conditions of transportation applying to shipments to various points in the blanket territory and to Buffalo and Ucross and as the only evidence in the record tends to demonstrate a difference in condition and circumstances between the points on the Wyoming and other points in the blanket territory, it appears that the finding and order of the Commission is unsupported by evidence and is arbitrary and void.

III.

The order of the Interstate Commerce Commission being unlawful and void, the order of the District Court should be reversed.

It is contended that the order of the Interstate Commerce Commission is unlawful and void, and as a result the District Court erred in overruling and denying the application for a preliminary injunction, in granting the motion to dismiss the bill of complaint and in dismissing the bill of complaint and entering the judgment in favor of the defendants, and that the judgment of the District Court below should be reversed.

....W T Alden.....,
Solicitor and Counsel for the Appellant, The Wyoming Railway Company.

C. R. Latham,
H. P. Young,
Chas. Martin,
H. C. Lutkin,
Of Counsel.

CONTENTS.

	Page.
STATEMENT	1
ARGUMENT	4
I. THE CHARGE OF TWENTY-FIVE CENTS OVER THE BLANKET RATE AGAINST BUFFALO SHIPPERS IS SO EXCESSIVE AS TO HAVE THE SOUND OF AN UNDUE PREJUDICE AND IF THE REPORT CONTAINS ANY EVIDENCE TO SUPPORT THE ORDER, THIS COURT WILL AFFIRM THE DECREE	4
Section 3 (24 Stat. 379, 380)	4
Section 15, as amended (36 Stat. 539, 551)	5
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57, 62	8
Houston & Texas Railway Co. v. *United States*, 234 U. S. 342, 356	9
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 220	10
Pennsylvania Co. v. *United States*, 236 U. S. 351	10
Interstate Commeece Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170	10
United States v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320	10
O'Keefe, Receiver, v. *United States*, 240 U. S. 294, 302	12
Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340	12
Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247	12, 13
II. THE ASSERTED IMPAIRED FINANCIAL CONDITION OF THE WYOMING RAILWAY COMPANY SHOULD NOT OVERTHROW THE ORDER OF THE COMMISSION	14
St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144, 145	14, 15
Regan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412	15
Covington, etc. Turnpike Co. v. *Sandford*, 164 U. S. 578, 596	16
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549	17
CONCLUSION	18

CASES CITED.

	Page.
Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247.	12, 13
Covington, etc., Turnpike Co. v. *Sandford*, 164 U. S. 578, 596.....	16
Houston & Texas Railway Co. v. *United States*, 234 U. S. 342, 356..	9
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549.....	17
Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170.....	10
O'Keefe, Receiver, v. *United States*, 240 U. S. 294. 302.....	12
Pennsylvania Co. v. *United States*, 236 U. S. 351.....	10
Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340.....	12
Regan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412.....	15
St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144, 145.....	14, 15
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57, 62....	8
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 220.....	10
United States v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320.	10

STATUTES CITED.

Act to Regulate Commerce:

Section 3 (24 Stat. 379, 380)..... 4

Section 15, as amended (36 Stat. 539, 551)..... 5

In the Supreme Court of the United States

OCTOBER TERM, 1923.

WYOMING RAILWAY COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION. } No. 38.

APPEAL FROM THE DISTRICT COURT OF6 THE UNITED STATES FOR THE DISTRICT OF WYOMING.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant appealed (Tr. 27) from the final decree of the District Court (Tr. 24) which sustained the motion of the United States (Tr. 21) to dismiss the bill for want of equity. The bill was filed to enjoin the order of the Commission in *Pioneer Lumber Co.* v. *Director General, etc.*, 64 I. C. C. 485. Circuit Judge Lewis and District Judges Riner and Kennedy concurred in a short opinion. (Tr. 32.)

Chicago, Burlington & Quincy Railroad cuts across the northeastern corner of the State of Wyoming. Clearmont is a station located on that line. Projecting southwest from Clearmont for a distance of 28.6

miles to Buffalo, Wyoming, with a population of 1,800, is the line of the Wyoming Railway. Intermediate and 10 miles southwest of Clearmont is Ucross with a population of about 100.

For many years the lumber rates in the Northwest have been blanketed both as to points of origin and destination. In *North West Lumber Cases*, 14 I. C. C. 1, 23, 41, 51, decided June 2, 1908, the Commission prescribed reasonable rates to Clearmont which is embraced in the so-called blanket territory. The Wyoming Railway was organized in 1910 but construction was not completed until 1918. (Tr. 13.)

On June 25, 1918, the rate on lumber from the coast group to Clearmont was 45 cents and from the Spokane group 38 cents. From Clearmont to Buffalo the rate was 20 cents, making combinations of 65 and 58 cents, respectively. (Tr. 14.) The present coast group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors up to Clearmont are 56.5 and 47.5 cents. (Tr. 14.) Buffalo shippers are thus required to pay a rate of 25 cents higher than the blanket rates accorded to other shippers. The Commission found (Tr. 15, 16):

> There is a divide known as Tunnel Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyo., is on the Burlington just west of Clearmont. Competitors of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by

reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyo., is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad, and is approximately halfway across country, between Buffalo and Casper. This complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about 10 miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

Spearfish and Deadwood, S. Dak., are located on the branch line of the Burlington that connects with the main line at Edgemont, S. Dak. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colo., about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming result in undue prejudice.

The Commission found that the interstate rates on lumber and lumber products were not and are not unreasonable, but that "the failure of defendants to extend the blanket rate on lumber to Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for the future will be unduly prejudicial." (Tr. 17.) The Commission entered the usual order, in the alternative, directing the trunk line carriers to cease and desist. (Tr. 17, 18.)

The bill was then filed alleging that "said report and order show on their face" that they were issued (1) without any substantial evidence, (2) without any evidence whatever, (3) in violation of the Constitution, and (4) in furtherance of a mistaken theory of the law. The rulings of the District Court in denying application for preliminary injunction, in sustaining motion of the United States to dismiss, and in entering judgment in favor of the defendants are the errors assigned (Tr. 28).

ARGUMENT.

I.

THE CHARGE OF TWENTY-FIVE CENTS OVER THE BLANKET RATE AGAINST BUFFALO SHIPPERS IS SO EXCESSIVE AS TO HAVE THE SOUND OF AN UNDUE PREJUDICE AND IF THE REPORT CONTAINS ANY EVIDENCE TO SUPPORT THE ORDER THIS COURT WILL AFFIRM THE DECREE.

Section 3 provides (24 Stat. 379, 380):

> That it shall be unlawful for any common carrier subject to the provisions of this act

> to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15, as amended, provides (36 Stat. 539, 551):

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, * * * (*either in extension of any pending complaint or without any complaint whatever*), the commission shall be of opinion that any individual or joint rates * * * regulations or practices whatsoever of such carrier or carriers subject to the provisions of this act are * * * *unduly preferential or prejudicial* or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation *to the extent to which* the Commission finds the same to exist, * * * [Italics ours.]

The report of the Commission is replete with evidence in support of its order. Thus (Tr. 16, 17):

> Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to

points located on its branch lines a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate, is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of section 3 of the interstate commerce act against undue prejudice applies to localities as well as to shippers at those localities. As was said in Intermediate Rate Asso. v. Director General, 61 I. C. C. 226, at page 233, respecting competition between localities:

Thriving communities, all in the same general section of the country, striving for population, industry and business growth, may not need elaborate evidence to show that they are

entitled to relief if the rates are not properly related.

The three Judges of the District Court quickly reached the conclusion that the bill should be dismissed and in delivering the oral opinion of the court Circuit Judge Lewis said (Tr. 33):

> We are of the opinion that this court can not assume that the present blanket rates will stand if, in the prorating, they will work confiscation of the complainant's property. Counsel for the Government and counsel for the Commission have indicated several ways in which that may be avoided. If the present rates are to stand, that is, if the present blanket rates are to be applied to Buffalo and Ucross the carriers west of Billings may be required to contribute a part of their present share of those rates, and the Burlington may likewise be required to contribute a part of its share of those rates south of Billings, so as to make up to the complainant the necessary compensation for the haul from Clearmont to Ucross and Buffalo, in order that confiscation may be avoided. Again, the carriers may have the right to raise the blanket rates to the extent of equalizing them to the Ucross and Buffalo rates.
>
> We all agree that in the present status of the proceeding this court is without power to take action, that the rights of the Wyoming Railway Company under the order of the Commission have not yet been determined, and it is impossible to know whether or not the

> action of the defendants in obeying the order of the Commission will result in confiscation. We understand that the Interstate Commerce Act empowers the Commission to adjust a proportionate division of a through rate between common carriers where they are unable themselves to agree upon it. For these reasons we are of opinion that the application for a temporary injunction should now be denied.

Moreover, the Chicago, Burlington & Quincy Railroad, the main defendant, has not intervened in the proceeding, as it had the right to do, nor taken any part therein. The same is true of all of the other trunk line carriers who were defendants before the Commission.

In *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S., 57, 62, commonly known as the *Richmond Switching Case*, the order of the Commission was sustained as within its authority under section 2 which was primarily directed against discrimination between shippers located in the same community. The carriers argued that the discrimination was justified because of the competition among the carriers. In rejecting the argument and sustaining the order, this Court, speaking by Mr. Justice Day, said:

> We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of

law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. (*Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.)

In *Houston & Texas Railway Co.* v. *United States*, 234, U. S. 342, 356, this Court, speaking through Mr. Justice Hughes, said:

It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (See also *Sou. Ry. Co.* v. *United States*, 204 Fed.,

465; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 118 Fed. 163.)

Section 3 forbids discrimination of any kind whatsoever.

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates.

In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 220, this Court said:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

What is undue or unreasonable preference or advantage is a question not of law but of fact. (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Texas & Pacific Ry. Co.* v. *United States*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170).

The determination of this question of fact is for the Commission, and its findings are conclusive. In *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320, this Court said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Central R. R.*, 215

U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. (*East Tenn., etc., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29.) And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving the purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

In *O'Keefe, Receiver,* v. *United States,* 240 U. S. 294, 302, this Court, speaking by Mr. Justice Pitney, said:

> Next it is insisted that the Commission applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element in determining whether a division is just and reasonable or unlawfully discriminatory. The order is not open to this criticism. It not only takes competitive conditions into consideration, but establishes the maximum divisions for the very purpose of preventing preferences, discriminations, and rebates as methods of competition.

Philadelphia & Reading Railway Co. v. *United States,* 240 U. S. 334, 340, has no application. In that case this Court, speaking by Mr. Justice McReynolds, said:

> Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself or in relation to others; * * *

Central Railroad Company of New Jersey v. *United States,* 257 U. S. 247, is against the appellant. In that case this Court, speaking by Mr. Justice Brandeis, said (p. 256):

> But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, * * *."

On the power of the Commission to remove discrimination and undue prejudice, in the *Central Railroad Company of New Jersey Case, supra,* this Court said (p. 259):

> It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Sec. 3 to remove discrimination so practiced. (See *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144.) But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. (*Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.,* 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1, 18.)

II.

THE ASSERTED IMPAIRED FINANCIAL CONDITION OF THE WYOMING RAILWAY SHOULD NOT OVERTHROW THE ORDER OF THE COMMISSION.

The findings of the Commission (Tr. 15) that the Wyoming Railway incurred operating deficits in the years 1918 and 1919; for three years it has not paid interest on its bonds, never paid any dividends on its stock or salaries to its officers and directors; and is operating through a sparsely settled country with no present prospect of increasing traffic; and the repetition of those findings in the allegations of the bill (Tr. 4) do not annul the orders of the Commission.

(1) In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144, 145, this Court, speaking by Mr. Justice Brandeis, said:

> Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

The order in the instant case did not compel the carriers to reduce rates as they were authorized to remove the discrimination by an order drawn in the alternative, "by raising the lower rate or by lowering the higher rate, or by doing both."

(2) Alleged impaired financial condition of the Wyoming Railway will not stay the power of the Commission to direct the discontinuance of undue prejudice.

In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 142, this Court, speaking by Mr. Justice Brandeis, said:

> *First.*—The carriers deny that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce.
>
> * * * * *
>
> The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186.

In *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412, this Court said:

> It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of

> others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

In *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596, this Court said:

> * * * we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It can not be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreason-

able and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public.

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549, this Court said:

> Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether

the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates can not be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

CONCLUSION.

The report and order of the Commission (Tr. 13, 17) are attached to the bill of complaint and made a part thereof as Exhibit A (Tr. 2). The findings of the Commission not being seriously controverted, it is respectfully submitted that the decree of the District Court was right and should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

O

INDEX.

Page.

STATEMENT OF THE CASE 1

PROCEEDINGS BEFORE THE COMMISSION 2

PROCEEDINGS IN THE DISTRICT COURT 11

QUESTIONS BEFORE THIS COURT 14

ARGUMENT 15

I. THE COMMISSION'S ORDER WILL NOT RESULT IN CONFISCATION 15

II. THE FACT THAT THE WYOMING RAILWAY DOES NOT PARTICIPATE IN TRANSPORTATION UNDER THE BLANKET RATES DOES NOT PRECLUDE A FINDING OF UNDUE PREJUDICE ... 16

III. WHETHER A PREJUDICE IS "UNDUE" IS AN ADMINISTRATIVE QUESTION FOR THE COMMISSION, AND IF THE COMMISSION'S FINDING IS SUPPORTED BY EVIDENCE IT WILL NOT BE DISTURBED BY THE COURT. THERE WAS AMPLE EVIDENCE HERE 31

CONCLUSION 35

TABLE OF CASES CITED.

Central R. R. Co. of New Jersey v. *United States*, 257 U. S. 247 23

Chamber of Commerce of Ashburn, Ga., v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140 21

Chamber of Commerce of Newport News v. *S. Ry. Co.*, 23 I. C. C. 345 .. 20

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184 28

Elk Cement & Lime Co. v. *B. & O. R. R. Co.*, 22 I. C. C. 84 22

Greenbaum Co. v. *C. & O. Ry. Co.*, 25 I. C. C. 352 22

Greenbaum Co. v. *L. & N. R. R. Co.*, 31 I. C. C. 699 22

Houston & Texas Ry. v. *United States*, 234 U. S. 342 36

Increased Rates, 1920, 58 I. C. C. 220 4

Illinois Central Railroad Company v. *Interstate Commerce Commission*, 206 U. S. 454 35

Indiana Steel & Wire Co. v. *C., R. I. & P. Ry.*, 16 I. C. C. 155 ..... 19, 21

Intermediate Rate Asso. v. *Director General*, 61 I. C. C. 226 9

Page.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144 32
Interstate Comm. Com. v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88 ..... 35, 36
Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452 31
Interstate Commerce Commission v. *Union Pacific Railroad*, 222 U. S. 541 31
La Grange Chamber of Commerce v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178 22
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 32
Northwest Lumber Cases 3
O'Keefe, Receiver, v. *United States*, 240 U. S. 294 34
Partridge & Sons Co. v. *P. R. R. Co.*, 26 I. C. C. 484 22
Paducah Case, 245 U. S. 136 (*St. L.-S. W. Ry. Co.* v. *U. S.*) 26, 28, 29
Penna. R. R. Co. v. *International Coal Co.*, 230 U. S. 184 ..... 30, 31, 32
Pioneer Lumber Co. v. *Director General*, 64 I. C. C. 485 1
Rates on Lumber from Southern Points, 34 I. C. C. 652 22
Rates from Walsenberg Coal Field, 26 I. C. C. 85 22
R. R. Commission of Tennessee v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418 ..... 19, 21
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57 32
Sheridan Chamber of Commerce v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250 22
Southern Pac. Co. v. *Darnell-Taenzer Co.*, 245 U. S. 531 30
Southern Ry. Co. v. *United States*, 204 Fed. 465 21
St. Louis-S. W. Ry. Co. v. *United States*, 245 U. S. 136 (*Paducah Case*) 26, 28, 29
United States v. *Louisville & Nashville Railroad*, 235 U. S. 314 31

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

WYOMING RAILWAY COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA AND Interstate Commerce Commission, appellees. } No. 38.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal by the Wyoming Railway Company from a final decree of the United States District Court for the District of Wyoming (Lewis, Circuit Judge, and Riner and Kennedy, District Judges) dismissing a bill seeking to set aside the order of the Interstate Commerce Commission in Docket No. 11608, *Pioneer Lumber Co.* v. *Director General*, 64 I. C. C. 485.

The Commission's order required the Wyoming Railway Co., the Chicago, Burlington & Quincy Railroad Co., and certain other railway companies, "according as they participate in the transportation," to remove a prejudice found to exist against certain

localities on the Wyoming and certain persons there engaged in business and in favor of certain localities, chiefly on the Burlington, and persons there engaged in business, in respect of rates on lumber.

PROCEEDINGS BEFORE THE COMMISSION.

The Commission's order, now under attack, was made in a proceeding instituted by a complaint, filed by the Pioneer Lumber Company and the Buffalo Lumber Company, in which it was alleged that rates on carload shipments of lumber and lumber products from points in Idaho, Montana, and Washington, to Buffalo and Ucross, Wyo., were unreasonable in violation of Section 1, unjustly discriminatory in violation of Section 2, and unduly prejudicial in violation of Section 3 of the Interstate Commerce Act. Reparation was sought in connection with past shipments, and reasonable, nondiscriminatory, and nonprejudicial rates were asked for the future.

All railroad companies which participate in the transportation were made parties respondent, namely, Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; The Great Northern Railway Company; Northern Pacific Railway Company; Oregon Trunk Railway Company; Spokane, Portland & Seattle Railway Company; and Wyoming Railway Company.

The case was regularly heard and the Commission made its report on November 3, 1921. (Rec. 12.) In the report it was stated "no evidence was offered

in support of the allegation of unjust discrimination" in violation of Sec. 2. The Commission found that the rates to Buffalo and Ucross were not unreasonable, but that they were prejudicial as compared with rates to certain other points, in violation of Sec. 3.

The findings of the Commission and the facts upon which they are based appear in the following excerpt from the report. (Reference to the map, plf. Ex. No. 3, following page 154 of the record, will be helpful.)

> Buffalo, with a population of 1,800, is the terminus of the Wyoming Railway, 28.6 miles southwest of Clearmont, Wyo., the junction with the Chicago, Burlington & Quincy, hereinafter called the Burlington. Ucross, with a population of about 100, is also on the Wyoming, 10 miles southwest of Clearmont.
>
> * * * * *
>
> The rates on lumber and lumber products in the northwest have, for many years, been blanketed both as to points of origin and destination. In the so-called *Northwest Lumber Cases*, 14 I. C. C. 1, 23, 41, 51, decided June 2, 1908, we prescribed reasonable rates to Clearmont, which is embraced in the so-called blanket territory. The components to Clearmont on lumber and lumber products here in issue are the rates thus prescribed, increased under the general increases of 1918 and 1920.
>
> * * * * *
>
> On June 25, 1918, the rate on lumber from the coast group to Clearmont was 45 cents and

from the Spokane group 38 cents. From Clearmont to Buffalo the rate was 20 cents, making combination rates of 65 and 58 cents, respectively. The present coast-group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors up to Clearmont are 56.5 and 47.5 cents, respectively. Complainants submitted exhibits which showed the ton-mile and car-mile earnings on shipments of lumber. These earnings were compared with earnings that would have accrued if the shipments had moved to other destinations in the blanket territory which took the same rates as Clearmont. For example, a shipment of fir lumber from National, Wash., to Buffalo, 1,270 miles, earned 10.2 mills per ton-mile and under the present rates it would earn 12.8 mills. If this shipment had moved to Spearfish, S. Dak., 1,556 miles, it would have produced 5.7 mills per ton-mile and would now produce 7.2 mills. The rates to Birds, Colo., 1,676 miles, on this shipment would have yielded 5.3 mills and 6.7 mills, respectively. The factor up to Clearmont on this shipment yielded 7.2 mills and the factor from Clearmont to Buffalo 14.03 cents per ton-mile. The present 81.5-cent rate from Everett Wash., to Buffalo, 1,128 miles, based on a load of 63,760 pounds, the average load of fir lumber as given in *Increased Rates, 1920*, 58 I. C. C., 220, by the West Coast Lumbermen's Association, yields car-mile earnings of 46.06 cents, while the present Everett-Clearmont rate of 56.5 cents produces car-mile earnings of 32.77 cents. If the Clearmont rate were extended

to Buffalo, the car-mile earnings would be 31.93 cents. The rate from Everett to Birds yields car-mile revenue of 21.45 cents.

Defendants maintain that these comparisons are of little value because blanket rates are compared with blanket rates and the specific earnings vary with the distances used. They contend that the average point of origin and the average point of destination in the respective blankets should be considered, and that as the factors up to Clearmont were prescribed by us in 1908, and subsequently increased under general order No. 28 and the general increase of 1920, they are in and of themselves reasonable.

It appears that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919; no interest has been paid on its bonds for nearly three years; no dividends have ever been paid on its stock; its officers and directors have received no salaries. Its line is only 28.6 miles in length and Buffalo is nearly 1,000 feet higher than Clearmont. The road is operated through a sparsely settled country, with no present prospect of increased traffic.

The above facts point to the conclusion that neither the combination rates nor the components thereof were or are unreasonable per se. The question remains as to whether the rates resulted in undue prejudice.

The Pioneer Lumber Company has lumber yards at Sheridan, 38 miles north of Buffalo by dirt road, and at Ucross as well as at Buffalo, while the Buffalo Lumber Company

has yards at Buffalo and at Kaycee, Wyo., about 60 miles south of Buffalo. The testimony shows that farmers within 8 miles north of Buffalo generally buy their lumber in Buffalo, but those farther north buy at Sheridan. There is a divide known as Tunnel Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyo., is on the Burlington just west of Clearmont. Competitors of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyo., is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad, and is approximately halfway across country, between Buffalo and Casper. This complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about 10 miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

Spearfish and Deadwood, S. Dak., are located on the branch line of the Burlington

that connects with the main line at Edgemont, S. Dak. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colo., about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming, result in undue prejudice.

Defendants state that they extend blanket rates to points on independent short lines only when compelled to do so by competition. The Burlington extends the blanket rate from a point about 70 miles south of Billings, Mont., for a distance of about 600 miles through Alliance, Nebr., to Denver, Colo. This blanket was originally established to meet competition on lumber from California via the Harriman lines. At that time the Big Horn division of the Burlington had not been completed and to compete with the Union Pacific at Denver the Burlington had to haul lumber received from the Great Northern and the Northern Pacific via its Sheridan route through Alliance. If the former rate had not been blanketed, fourth section violations would have been created along the Sheridan line. This would not

62992—23——2

account for the Burlington's extending the blanket to Spearfish, an additional haul from Edgemont of 130 miles. Competitive reasons compelled the extension of the blanket rates to Birds. The Great Western has two connections with the Union Pacific, one at Eaton, Colo., and one at Kelim, Colo.; two connections with the Colorado & Southern, one at Loveland, Colo., and one at Windsor, Colo., besides the connection with the Burlington at Longmont, Colo. Defendants contend that this competition distinguishes the situations at Birds and at Buffalo. But there is no such carrier competition at local main-line and branch-line stations on the Burlington in this blanket territory.

Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to points located on its branch lines, a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mile-

age from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of section 3 of the interstate commerce act against undue prejudice applies to localities as well as to shippers at those localities. As was said in *Intermediate Rate Asso.* v. *Director General*, 61 I. C. C. 226, at page 233, respecting competition between localities:

"Thriving communities, all in the same general section of the country, striving for population, industry, and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related."

We find that the interstate rates assailed on lumber and lumber products were not and are not unreasonable; * * * but that the failure of defendants to extend the blanket rates on lumber to Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for the future will be unduly prejudicial. Complainants have not shown that they were

damaged by any undue prejudice which may have existed in the past. Reparation is therefore denied. (Rec. 13–17.)

The pertinent language of the order follows:

> *It is ordered,* That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 24, 1922, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of lumber and lumber products, in carloads, from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which exceed the rates made on the basis prescribed in the next succeeding paragraph hereof.
>
> *It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 24, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which do not exceed the rates contemporaneously maintained by them on lumber and lumber products from the same points to Clearmont and Sheridan, Wyo., and other points in the blanket territory on defendants' lines and independent connecting lines." (Rec. 17, 18.)

PROCEEDINGS IN THE DISTRICT COURT.

January 16, 1922, the Wyoming Railway Company filed its bill of complaint in the court below for the purpose of enjoining the enforcement of the Commission's order. (Rec. 1.) The other railway companies against which the order was directed apparently acquiesced in the order, for none joined in the action.

The bill did not deny any of the evidential facts set forth in the Commission's report or allege additional material facts.

The United States filed a motion to dismiss (Rec. 21) and the Commission filed an answer. (Rec. 22.) On these pleadings, the court below heard the case, denied the application for temporary injunction, and dismissed the bill. (Rec. p. 24.)

The following oral opinion was delivered:

> The Court (by Judge Lewis): It appears from the bill of complaint in this case that the Pioneer Lumber Company and the Buffalo Lumber Company complained before the Interstate Commerce Commission against the Director General of Railroads, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, the Great Northern Railway Company, the Northern Pacific Railway Company, the Spokane, Portland & Seattle Railway Company, and the Wyoming Railway Company for violation of the first three sections of the Interstate Commerce Act. On hearing before the Commission it was found that there had been no violation of sections one and two, but

that the practice of all of the defendants in putting in effect a rate of 81½¢ on lumber from Washington and Pacific Coast points to Ucross and Buffalo, and a rate of 72½¢ from points in the Spokane group to Ucross and Buffalo, was unduly prejudicial to the Pioneer Lumber Company, to the Buffalo Lumber Company, and to the two localities of Ucross and Buffalo.

That conclusion was arrived at on account of the blanket rate to Clearmont, Sheridan, Alliance, Edgemont, Deadwood, Spearfish, and other points being 25¢ lower than to Ucross and Buffalo, and that Ucross and Buffalo being in the same section or territory, this worked undue prejudice to the two complainants and to these localities, and on that the Commission made its order finding that these defendants, acting together, should put in a new rate to Buffalo and Ucross in order to remove that undue prejudice to these two localities and to the two complainants. The higher rates to Ucross and Buffalo were brought about by adding the complainant's local rate to the blanket rate at Clearmont, the junction point.

Now, the third section of the Interstate Commerce Act undoubtedly vests the Commission with power to take such action as may be necessary to remove undue prejudice to shippers and localities located in the same general section of the country. That appears to be a part of their duties and the purposes of establishing the Commission. Much has been said on the part of the complainant as to the present blanket rates, and that its

share of those two rates, if they are to prevail, will be so small that the compensation to it will be confiscatory.

We are of the opinion that this court can not assume that the present blanket rates will stand if, in the prorating, they will work confiscation of the complainant's property. Counsel for the Government and counsel for the Commission have indicated several ways in which that may be avoided. If the present rates are to stand; that is, if the present blanket rates are to be applied to Buffalo and Ucross the carriers west of Billings may be required to contribute a part of their present share of those rates, and the Burlington may likewise be required to contribute a part of its share of those rates south of Billings, so as to make up to the complainant the necessary compensation for the haul from Clearmont to Ucross and Buffalo, in order that confiscation may be avoided. Again, the carriers may have the right to raise the blanket rates to the extent of equalizing them to the Ucross and Buffalo rates.

We all agree that in the present status of the proceeding this court is without power to take action, that the rights of the Wyoming Railway Company under the order of the Commission have not yet been determined, and it is impossible to know whether or not the action of the defendants in obeying the order of the Commission will result in confiscation. We understand that the Interstate Commerce Act empowers the Commission to adjust a proportionate division of a through rate be-

tween common carriers where they are unable themselves to agree upon it. For these reasons we are of opinion that the application for a temporary injunction should now be denied.

There is a motion on the part of the United States to dismiss; and while the Commission has answered, it is practically a motion to dismiss also on its part, because it justifies, and does no more than justify, the action that it took in ordering the extension of the same rates to Buffalo and Ucross as to other towns in this general section of the country. We think the bill should be dismissed. (Rec. 32, 33.)

QUESTIONS BEFORE THIS COURT.

The Wyoming appealed to this Court, making general assignments of error to the effect that the District Court erred in denying the injunction and dismissing the bill.

Appellant relies upon three contentions to show that the Commission's order should be set aside:

1. The order will result in the confiscation of its property.

2. The Commission can not find a relationship between two rates prejudicial, although one or more carriers participate in the transportation under both rates, if one of the carriers which participates in the transportation under one rate does not also participate in the transportation under the other rate.

3. There is no evidence to support the finding that the prejudice against Buffalo and Ucross was "undue."

These contentions will be answered in order.

ARGUMENT.

I.

THE COMMISSION'S ORDER WILL NOT RESULT IN CONFISCATION.

The claim of confiscation, as a separate and distinct ground for setting aside the order, is apparently abandoned in appellant's brief in this Court. But the point seems to be relied upon in a more or less indirect fashion, and a short answer may not be out of place.

The claim is based upon the fact that appellant was operating at a loss and upon the assumption that the Commission's order would reduce its revenue from lumber transportation.

The assumption is erroneous. The order does not require the reduction of any rate. It does not fix rates but merely the adjustment of rates. The order would be satisfied if the blanket rates, applicable to Clearmont, Spearfish, etc., were raised to the level of the present rates to Buffalo. Moreover, even if the order required the reduction of the Buffalo rate, this would not necessarily result in a reduction of the revenue of the Wyoming Railway. That would depend upon the division of the new rate. The Wyoming could come to the Commission to have just and reasonable divisions fixed. After that, and not before, conceivably, the question of confiscation might arise. On this point, attention is called to the following language in the Commission's report:

> The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue. (Rec. 16.)

62992—23—3

II.

THE FACT THAT THE WYOMING RAILWAY DOES NOT PARTICIPATE IN TRANSPORTATION UNDER THE BLANKET RATES DOES NOT PRECLUDE A FINDING OF UNDUE PREJUDICE.

The question which will be discussed under this head involves a construction of that part of Section 3 reading as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The position taken by appellant on this branch of the case is stated in paragraphs XVII and XIX of its bill as follows (Rec. 7, 8):

XVII.

> Plaintiff further shows that the defendant common carriers in the said proceeding before the Interstate Commerce Commission other than the Wyoming Railway Company are without power under the law to extend present blanket rates on lumber now applicable to Clearmont, Wyoming, and other points on their lines, to the local stations of Ucross and Buffalo, Wyoming, on the line of the Wyoming Railway Company, unless the Wyoming Railway Company consents thereto. Plaintiff

shows that the Wyoming Railway Company declines and refuses to permit other said carriers to extend such blanket rates to points on its line, but instead insists that the service which it performs justifies higher rates to points on its line than to points on the lines of other carriers. Plaintiff further states that the effort of the Interstate Commerce Commission to compel and require the Wyoming Railway Company to permit carriers other than itself to establish said blanket rates to points on its line is arbitrary and void.

XIX.

Plaintiff further states that the Wyoming Railway Company can not be jointly or severally held responsible for any undue prejudice in connection with the rates on lumber from producing points in Idaho, Montana, and Washington, to points on the lines of other railway companies where it does not participate in the transportation, nor join in the publication of the said rates, and that any order made in respect to the Wyoming Railway Company in these circumstances is unsupported by any substantial evidence and is contrary to the law, exceeds the power of the Interstate Commerce Commission, and is arbitrary and void, as to the Wyoming Railway Company, and as the carriers other than the Wyoming Railway Company can not comply with the order of the Commission entered without the consent of the Wyoming Railway Company, the order is likewise arbitrary and void as to them.

The practical significance of appellant's contention will be more readily understood in the light of a concrete example taken from the facts in this case.

On lumber moving from National, Wash., to Buffalo, the Burlington and its western connection perform the transportation for a distance of 1,242 miles to Clearmont and the Wyoming for a distance of 28 miles from Clearmont to Buffalo. On lumber moving from the same point of origin to Sheridan, Clearmont, Spearfish, and the other points taking the blanket rate, the Burlington and its western connections perform the entire transportation.

The relationship, which the Commission found unduly prejudicial to Buffalo, was the relationship between the blanket rate and the rate to Buffalo. As pointed out above, the identical carriers which perform the transportation under the blanket rate perform 1,242 miles of the 1,270 miles of transportation under the rate to Buffalo.

Is the Commission powerless to remove the prejudice simply because the Wyoming, which does not participate in the transportation under the blanket rate, does participate for an extremely short distance in the transportation to Buffalo?

This question has been before the Commission literally hundreds of times and the Commission has always held that it was not without power to remove a prejudice arising from the improper relationship of two rates, when one or more carriers were parties to both rates, simply because one of the carriers which participated in transportation

under the one rate did not participate in transportation under the other rate.

Indiana Steel & Wire Co. v. *C. R. I. & P. Ry.*, 16 I. C. C. 155, decided in 1909, was one of the early cases in which the question arose. The Commission there found that rates from Kokomo and Muncie, Ind., to Arkansas common points were prejudicial as compared with the rates from Chicago to the same destinations. The only carriers which served Kokomo and Muncie did not participate in the transportation from Chicago; but to Arkansas points, the traffic from Chicago and the traffic from Muncie and Kokomo moved over the same railroads west of the Mississippi River crossings.

In *R. R. Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418, it was found that the rate on cotton from Jackson, Tenn., to New England mills was unduly prejudicial as compared with the rate on cotton from Brownsville, Tenn., to the same destinations. The Louisville & Nashville was the only road serving Brownsville, and it did not participate in the transportation from Jackson. North of the Ohio River the transportation from Jackson and from Brownsville was over the same railroads. The Commission said, at page 421:

> It is urged, further, that the line from Brownsville to destination is not the same as the line from * * * Jackson. But this is not a question under the fourth section, and therefore not a question of the same line. The inquiry is, Do these defendants by their

joint rates unduly discriminate against Jackson in favor of Brownsville? In our opinion they do. This discrimination does not exist by virtue of the action of the Louisville & Nashville alone but by reason of the united action of these different defendants. Without the consent of the lines north of the Ohio the discrimination would not exist, and it therefore lies within the power of those lines to stop it. If the Louisville & Nashville extended all the way from Brownsville to the delivering point, a different question would be presented. * * * We do not think that the fair intent of the act would permit the discrimination here existing in these rates between two localities but 25 miles apart where the service for more than half the distance is by the same railroad. The Nashville, Chattanooga & St. Louis Railway extends from Jackson north to Paris, where it unites with the Louisville & Nashville. Cotton from Jackson passes 80 miles over the Nashville, Chattanooga & St. Louis and for the balance of the distance over the same line as that from Brownsville. Assume, now, that the Louisville & Nashville elected to maintain a rate of 70 cents from Brownsville, but the Nashville, Chattanooga & St. Louis, as the initial line, established a rate of 60 cents from Jackson. Could it be said that this road which hauls the traffic but 80 miles out of a total distance of 1,306 miles is entitled to create and perpetuate that rate condition? We think not. * * *

In *Chamber of Commerce of Newport News* v. *S. Ry. Co.*, 23 I. C. C. 345, it was found that rates from

southeastern freight association territory to Newport News were unduly prejudicial as compared with rates from the same points to Norfolk. The Commission said, at page 352:

> The Southern, Coast Line, Seaboard, and Norfolk & Western contend that their lines do not serve Newport News, and for that reason they can not be held responsible for any discrimination that may exist against Newport News. While it is true that none of their lines actually reaches Newport News, nevertheless they all participate in Newport News traffic to and from the south by way of Norfolk or through connections with the Chesapeake & Ohio at Richmond.
>
> * * * * *
>
> The southern carriers participate actively in Newport News traffic to and from the south and southwest, and they practically control the rates between Newport News and points within association territories. The fact that their rails do not extend to Newport News can not relieve them from responsibility for the effect of rates which they control and in which they participate. *R. R. Com. of Tenn.* v. *A. A. R. R. Co.*, 17 I. C. C. 418; *Indiana Steel & Wire Co.* v. *C., R. I. & P. Ry. Co.*, 16 I. C. C. 155; *Chamber of Commerce of Ashburn, Ga.*, v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140.

The Commission's order was upheld by the Commerce Court, *Southern Ry. Co.* v. *United States*, 204 Fed. 465.

It will be observed that each of these cases involved a situation where one or more carriers partici-

pated in transportation under one rate in the improper adjustment but not in transportation under the other rate and where one or more other carriers participated in transportation under both rates.

Other cases in which the Commission followed the same rule are very numerous and include the following:

> *Elk Cement & Lime Co.* v. *B. & O. R. R. Co.*, 22 I. C. C. 84, 89; *Greenbaum Co.* v. *C. & O. Ry. Co.*, 25 I. C. C. 352, 355; *Rates from Walsenberg Coal Field*, 26 I. C. C. 85, 89; *Partridge & Sons Co.* v. *P. R. R. Co.*, 26 I. C. C. 484, 486; *La Grange Chamber of Commerce* v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178, 184; *Sheridan Chamber of Commerce* v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250, 258; *Greenbaum Co.* v. *L. & N. R. R. Co.*, 31 I. C. C. 699, 707; *Rates on Lumber from Southern Points*, 34 I. C. C. 652, 671.

In many of the cases which have come before the Commission, the rates, the relationship of which was prejudicial, were joint rates. That is to say, the carrier, which participated in transportation under one of the rates and not under the other, performed such transportation under a rate jointly established by it and the other carriers taking part in that transportation, such other carriers being parties also to the transportation under the other rate in the prejudicial relationship.

In this case, the rate to Buffalo was not a joint rate but a combination of the local rate to Clearmont and the local rate of the Wyoming from Clearmont

to Buffalo. This difference is pointed out for the purpose of showing that it is not important. A combination of local rates applicable over a through route such as we have here, is a through rate just as a joint rate is a through rate. The only distinction is in the form of publication. Both a joint rate and a combination through rate apply to continuous transportation performed as a result of an arrangement, express or implied, between the carriers. A combination rate is to be regarded as a unit and if it is unreasonably high it may be reduced by the Commission regardless of the reasonableness of its component parts.

Appellant, in support of its contention that there can be no prejudice because the Wyoming does not participate in transportation under the blanket rates, relies chiefly on *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247. But that case is essentially different from this case. There the facts were as follows: Joint through rates were published on forest products from points in the south to points north and east of Newark, N. J. Shipments moving under these rates passed over the lines of several different carriers. At certain points in the south, on the route of movement under these rates, the southern carriers granted a creosoting in transit privilege.[1] The Pennsylvania Railroad and the Jersey Central

[1] The court described the privilege on page 254 as follows:

"By the privilege called creosoting in transit, forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named."

Railroad refused to grant a similar privilege at Newark. Upon a complaint, naming the Pennsylvania, the Jersey Central, and certain other carriers as respondents, but failing to include as respondents the railroads which granted the transit privileges in the south, the Commission found that the failure to grant the privilege at Newark while it was being granted at the southern points constituted a prejudice against Newark.

This court held that the Commission's order was void because a transit privilege is a matter local to the railroad on which the transit point is located, saying:

> * * * Under the rules of the Commission governing the making, filing and publishing of tariffs, privileges like creosoting-in-transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. * * *

It follows that the Pennsylvania and the Jersey Central, which refused the privilege at Newark, were not responsible for the action of the southern carriers in granting the privilege at points on their lines and the southern lines were not responsible for the failure of the Pennsylvania and Jersey Central to grant the privilege at Newark.

A prejudice results from a relationship between two rates or practices. In the *Jersey Central case* the relationship was between two practices, the granting

of the privilege at southern points and the failure to grant it at Newark. No one carrier was in whole or in part responsible for both practices. In this case, the prejudice results from the relationship between two rates—first, the blanket rate, and second, the rate to Buffalo. The Burlington and its western connections participate in both of these rates.

The question here is whether the Wyoming can, as a legal right, obstruct the Commission's effort to remedy the prejudice, particularly when it can not show, as we will point out, that to do so would decrease its revenue or otherwise injuriously affect its interests.

The Wyoming alleges in its bill, paragraph XIX (Rec. 7), that the other carriers can not remove the prejudice without its consent, and alleges, in paragraph XVII (Rec. 7), that it refuses to permit the other carriers to extend the blanket rates to points on its line.

As a matter of fact, the other carriers could, as before explained, comply with the Commission's order without the consent of the Wyoming by raising the blanket rates to the level of the Buffalo rate or by establishing proportional rates to Clearmont on lumber destined to points on the Wyoming which, when added to the local rates of the Wyoming, would produce combination through rates equal to the blanket rates.

The consent either voluntary or enforced, of the Wyoming would be necessary if the Commission's order were to be complied with by publishing joint

rates to points on its line no higher than the blanket rates. Even if this method were adopted, there is no reason to believe that the Wyoming would receive less revenue than it obtains under its present local rates. This would depend upon its divisions which the Commission has the power to fix. In fixing those divisions, no doubt the Commission could consider that the blanket rates to points on the Wyoming, lower than rates which the Commission has found are not unreasonable, were primarily the result of the action of the Burlington and its Western connections in maintaining the blanket rates to points much farther distant than the points on the Wyoming. No one can say at this time that the divisions which the Wyoming would receive would not be equal to the local rates it now receives.

We have tried to show that the *Jersey Central case* is not controlling here. In this connection, it is noteworthy that the court in that case referred with approval to *St. Louis-S. W. Ry. Co.* v. *United States*, 245 U. S. 136, the so-called *Paducah case*, which, in so far as it involved Sec. 3, is almost exactly like the case at bar. There, an order of the Commission, based upon a finding that the lumber rates from the southwest to Paducah were unreasonable and unduly prejudicial as compared to the rates to Cairo, was under review. Paducah is situated on the south bank of the Ohio River, 42 miles above Cairo, Ill. Each city is a manufacturing and jobbing center for lumber and draws its lumber in part from the extensive region lying west of the

Mississippi River and south of the Arkansas River, known as the "blanket territory." The principal railroads serving the blanket territory were the St. Louis-Southwestern, St. Louis, Iron Mountain & Southern, and Chicago, Rock Island & Pacific. The first two had their own lines from the blanket territory to Cairo, and could reach Paducah only over a connecting line. The Rock Island reached both Cairo and Paducah only over a connecting line. The Rock Island had established a route via Memphis; but the other two companies had through routes to Paducah only via Cairo. From Cairo to Paducah transportation was over the Illinois Central. As to the Memphis route, transportation from Memphis was via the Illinois Central. The rate to Cairo was 16 cents and the rate to Paducah, via Cairo, a combination rate made up of the 16-cent local rate to Cairo plus the 6-cent local rate from Cairo to Paducah. The Commission found that (1) the 22-cent rate to Paducah was unreasonable in that it exceeded the existing rate to Cairo; (2) that the existing disparity of rates gave to Cairo an undue preference and advantage over Paducah; (3) that through routes and joint rates no higher than Cairo rates should be established to Paducah via either Memphis or Cairo.

The carrier connecting at Cairo (the Illinois Central) acquiesced in the order establishing the joint rate.

The court upheld the Commission's order and said at page 144:

> The carriers insist also that the order is void on the ground that since their "rails

> do not reach Paducah they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reach Paducah, although not on their own rails, and thereby they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly, the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.* (162 U. S. 184.)

The court said further at page 143.

> If these complaining carriers can not reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the act to regulate commerce, apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

It is true that in the *Paducah case* there was a finding of unreasonableness as well as a finding of prejudice, the court saying, at pages 144, 145:

> * * * The order in the case at bar is not merely one to prevent discrimination. * * * It is not primarily an order to remove discrimination in violation of section 3.

Nevertheless, the discussion in the opinion indicates clearly that the order was sustainable on grounds of discrimination, regardless of other grounds.

The case at bar is similar to the Paducah case. In this case the Burlington and its western connections occupy the same position that the Iron Mountain, St. Louis-Southwestern, and the Rock Island occupied in the Paducah case; that is to say, they participate in two rates, the relationship of which is unlawful. And the Wyoming in this case stands in the position of the Illinois Central in the *Paducah case;* that is to say, it is a party to the transportation under one of the rates, but not to transportation under the other. It participates in the transportation to Buffalo but not in the transportation to points on the Burlington, as the Illinois Central participated in the transportation to Paducah, but not in the transportation to Cairo. In the Paducah case the Illinois Central did not protest the order as the Wyoming is protesting in this case, but the failure of the Illinois Central to protest could not empower the Commission to make a finding of prejudice if, as a matter of law, no prejudice existed.

Before leaving this question we should point out that if the Commission can not remedy a rate situation such as that here presented by a finding of prejudice under Section 3, it can not satisfactorily reach it at all.

It may be suggested that the Commission has ample power to properly adjust the rates by findings of unreasonableness under Section 1 and by fixing

maximum or minimum rates, or both. But such a course would present serious difficulties. The rate to Buffalo, standing by itself, is not unreasonably high or otherwise unlawful; the blanket rate standing by itself is not unreasonably low or otherwise unlawful. The real evil is the relationship between these rates, and the only way of striking *directly* at this relationship is by a finding of prejudice.

Would the Commission be justified in attempting to cure the evil *indirectly* by findings of unreasonableness? The distinction between a finding of unreasonableness and a finding of prejudice is of great practical importance, and this is at once manifest when we consider that the rule respecting reparation in the case of a finding of unreasonableness is different from that applicable in the case of a finding of prejudice.

A shipper who pays an unreasonable rate is entitled to recover the excess between that rate and a reasonable rate without further showing of damage. The fact that he may have passed on the damage to the purchasers of the goods or to others is immaterial. *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. On the other hand, the fact that a shipper has paid a rate which was unduly prejudicial to him when compared with the rate paid by another shipper is not, of itself, sufficient to support an award of reparation. He is entitled to a recovery only if he can show actual pecuniary loss. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184.

In view of this distinction as to reparation, it would seem that the Commission should carefully avoid findings of unreasonableness when the real evil is merely a prejudicial rate adjustment. Complainant in this case showed no pecuniary loss as a result of the rate prejudice and reparation was accordingly denied. If the Commission had found the rate to Buffalo unreasonably high, complainant would have been entitled to reparation down to the basis of the rate found reasonable.

III.

WHETHER A PREJUDICE IS "UNDUE" IS AN ADMINISTRATIVE QUESTION FOR THE COMMISSION AND IF THE COMMISSION'S FINDING IS SUPPORTED BY EVIDENCE, IT WILL NOT BE DISTURBED BY THE COURT. THERE WAS AMPLE EVIDENCE HERE.

Appellant urges that the prejudice disclosed by the record was not "undue."

By a long line of decisions this Court has established the doctrine that the Commission's judgment on administrative questions is final if supported by evidence. The Court will not review the wisdom of the Commission's order, or substitute its judgment for that of the Commission, even when it is conceded that the facts would support a finding contrary to that reached by the Commission. *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452, at 470; *Interstate Commerce Commission* v. *Union Pacific Railroad,* 222 U. S. 541, at 547; *Penna. R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, at 196; *United States* v. *Louisville & Nashville Railroad,*

235 U. S. 314, at 320; *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, at 62.

In *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, at 481 it was said:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

In *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, at 196, it was said:

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has

> been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

The only question, arising under this contention of appellant, which is now open, is whether there was evidence to support the Commission's finding that the prejudice was "undue."

The undisputed facts set forth in the Commission's report, quoted hereinbefore, are amply sufficient. It will serve no purpose to repeat or summarize them, but we do desire to again direct attention to certain of them.

Rates on lumber in the northwest have for many years been blanketed both as to points of origin and destination. From points of origin here involved blanket rates are in force to destinations on that part of the main line and branch lines of the Burlington beginning about 70 miles south of Billings, Mont., and extending through Clearmont and Alliance, about 600 miles to Denver. Blanket rates also apply to points on at least one independent line connecting with the Burlington in this territory, namely, the Great Western, which serves Birds, Colo. Clearmont, the junction between the Burlington and the Wyoming, is within the blanket territory, about 181 miles south of Billings. Buffalo and Ucross are points on the Wyoming, 28 and 10 miles, respectively, from Clearmont. The blanket rates are 56.5 cents per hundred pounds from points of origin in the coast

group and 47.5 cents from Spokane. The rates to Ucross and Buffalo are higher than the blanket rates. From the coast group the rate to Buffalo is 81.5 cents and from Spokane 72.5 cents.

The blanket rates apply to points much farther distant from points of origin than Buffalo. For example, from National, Wash., a typical point of origin in the coast group, to Buffalo is 1,270 miles. From the same point to Spearfish, S. Dak., the distance is 1,556 miles; to Deadwood, S. Dak., 1,533 miles; and to Birds, Colo., 1,676 miles. Although there is no competition between lumber dealers located at considerable distances apart in this extensive blanket territory, there is competition between the complainants, located at Buffalo and Ucross, and lumber dealers at Clearmont, at Sheridan and Ulm, Wyo., on the Burlington, a few miles west of Clearmont, and at Casper, Wyo., on the Burlington, 135 miles south of Buffalo, all of which take the blanket rates.

Plainly appellant's contention that there was no evidence to support the Commission's finding that the prejudice is "undue" is without merit.

In *O'Keefe, Receiver,* v. *United States,* 240 U. S. 294, at page 303, it was stated:

> It is said there was no evidence to enable the commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost

> of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others.

In *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, at 110, 111, it was said:

> One question remains for discussion, the finding of the commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the commission to make, and that its findings are fortified by presumptions of truth, "due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions.

CONCLUSION.

The relative adjustment of rates is generally of greater importance to shippers than the level of rates. The chief purpose of the regulation of interstate carriers was to do away with discrimination between persons and places. Regulatory legislation

was based on the theory that "the paramount evil chargeable against the operation of the transportation system of the United States" was such discrimination. *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 356. And the Commission was instituted to prevent such discrimination. *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, 102.

The situation before the Commission presented a typical instance of discrimination between persons and localities. The evil could be directly remedied only by a finding of undue prejudice under Section 3. It could not be satisfactorily remedied by findings of unreasonableness under Section 1.

The Burlington and its western connections participated in the transportation under both rates, the relationship of which was improper. The Wyoming participated in the transportation under one rate but not under the other. This carrier should not be permitted to obstruct the removal of the maladjustment particularly when it is not in a position to show that compliance with the Commission's order would reduce its revenue or otherwise injuriously affect its interests.

J. CARTER FORT,
Solicitor for the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

WASHINGTON, D. C., *September, 1923.*

○

SUPREME COURT OF THE UNITED STATES.

Nos. 40 and 38.—October Term, 1923.

The United States et al., Appellants,		Appeal from the District Court of the United States for the Southern District of Mississippi.
40	*vs.*	
Illinois Central R. R. Co. et al.		
Wyoming Railway Co., Appellant,		Appeal from the District Court of the United States for the District of Wyoming.
38	*vs.*	
The United States et al.		

[January 7, 1924.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, brought to set aside orders of the Interstate Commerce Commission, were argued together, and present, in the main, the same questions of law. In each, carriers who were found to have unjustly discriminated against shippers of lumber located on an independent short line, were ordered by the Commission to cease and desist from charging them higher through rates than were contemporaneously charged for like services from other points within what is called blanket territory.[1] Each case was heard before three judges on plaintiff's motion for a preliminary injunction, on defendant's motion to dismiss the bill for want of equity, and on final hearing. In each the whole record before the Commission was introduced. In No. 40 the federal court for southern Mississippi perpetually enjoined the enforcement of the order issued by the Commission in *Swift Lumber Company* v. *Fernwood & Gulf R. R. Co.*, 61 I. C. C. 485. In No. 38 the federal court for Wyoming dismissed the bill; thus sustaining the order issued by the Commission in *Pioneer Lumber Co.* v. *Director General*, 64

[1]Compare St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 138, note 1. The carriers insist that the rates are not properly called blanket rates, since they do not apply to all points within the territory; and that they should be termed group rates.

I. C. C. 485. Each case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The facts in No. 40 present most of the questions of law requiring discussion. The so-called blanket territory, which extends south from Jackson, Mississippi, to the Gulf of Mexico (about 200 miles), and from the Mississippi River into Alabama, produces yellow pine lumber in quantity. Through this territory, the Illinois Central Railroad extends from New Orleans to Jackson and thence to the Ohio River crossings and leading lumber markets of the North. Partly by its main line, partly, also, by branches, and partly by connections with independent lines, it serves a large percentage of the lumber mills in the territory. From all these points on the Illinois Central main line, from all on its branches, from all on three independent short lines which connect indirectly with it, and from all on the Mississippi Central (a longer independent line which crosses it running East and West) the carriers have established the same through lumber rates to the northern markets, regardless of the varying distances within the blanket territory. At Fernwood, Mississippi, a little south of its Monticello branch, the Illinois Central connects with the Fernwood & Gulf, an independent short line, on which the Swift Lumber Company has a mill at Knoxo. The distance from Knoxo to the junction is 27 miles. The joint through rate from Knoxo *via* Fernwood to northern points, voluntarily established by these carriers, is 2 cents per 100 pounds higher than the rate from Fernwood or any other point within the so-called blanket territory on the Illinois Central main or branch lines or on the connections mentioned above. The distance to the northern markets from many of the points on these lines is much greater than the distance from Knoxo, which lies near the centre of the so-called blanket territory.

The Swift Lumber Company instituted proceedings before the Commission against the Illinois Central, the Fernwood & Gulf, and connecting carriers in which it attacked the higher rates from Knoxo both as unreasonable, under Section 1 of the Act to Regulate Commerce, and as unjustly discriminatory, under Section 3. The Commission found that the rates from Knoxo were not unreasonable; but that they subject the Lumber Company to undue prejudice, in view of the lower rates so given competing points within the so-called blanket territory. The order directed the carriers "according as they participate in the transportation . . to cease and desist" from the discrimination found. All

the carriers except the Illinois Central and the Fernwood & Gulf acquiesced in the order. These two joined as plaintiffs in this suit, and urge on several grounds that the order is void.

First. It is contended that the order exceeds the powers of the Commission. The argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence, that it cannot be required to cooperate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable. That, on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines and it is not in a position to remove, by its own act, the discrimination complained of. Neither proposition is sound. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced, as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it.[2] Moreover, it is not

[2]The cases relied upon by the carriers are not inconsistent with this conclusion. In Central R. R. Co. of New Jersey v. United States, 257 U. S. 247, the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff granted without the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them. In Philadelphia & Reading Ry. Co. v. United States, 240 U. S. 334, 340, it was pointed out by the Court that: "Undue discrimination against itself or the locality of its plant, as alleged by the cement company [the petitioner before the Commission] was not found; the community declared to be prejudiced by established conditions [Jersey City] had offered no complaint and was not party to the proceedings." In Penn Refining Co. v. Western New York and Pennsylvania R. R. Co., 208 U. S. 208, 221-222, it was sought to hold one of the connecting carriers liable for what the Court deemed to be the act of another.

true that the Illinois Central cannot remove the discrimination without the cooperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point.[3]

Second. It is contended that the order of the Commission is unsustained by proof. That there is discrimination against Knoxo is not denied. The rates charged from that station are higher than those charged from competing points within the so-called blanket territory for transportation of the same commodity, to the same market, for the same or longer distances, mainly over the same route; some of these competing points being located on the Illinois Central main line, some on its branch lines, and some on independent lines. But mere discrimination does not render a rate illegal under Section 3. Only such rates as involve unjust discrimination are obnoxious to that section. *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 481. There is no claim that any one of the evidential facts found by the Commission and relied upon to show that the discrimination was unjust, is without adequate supporting evidence. The argument is that these facts, even when supplemented by others appearing in the evidence, do not warrant the finding of the ultimate fact, that the higher rates from Knoxo are unduly prejudicial to the Swift Lumber Company to the extent that they exceed the blanket basis of rates from Fernwood (the junction with the Illinois Central) and other points.

A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise. *Interstate Commerce Commission* v. *Chicago, Great Western Ry.*, 209 U. S. 108, 118-119; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92. In the exercise of this right, the Illinois Central adopted the policy of establishing blanket, or group, rates on its main and branch lines, by which the remoter

[3]See St. Louis Southwestern Ry. Co. *v.* United States, 245 U. S. 136, 139, note 2.

lumber producing points were granted, regardless of distances within the territory, the same rates to northern markets as points located nearer. In the exercise of the same right to initiate rates, the Illinois Central adopted, also, the policy of granting to connecting independent short lines, and to longer connecting carriers, an allowance (called shrinkage or absorption) by reason of which the Illinois Central's division of the through rate on traffic originating on connections is reduced, by the amount of the allowance, to less than its rate for freight originating on its own line at the junction point.[4] The Illinois Central insists that its general policy is not to grant to points on connecting lines the blanket, or junction-point rate; and that it departs from this policy only when it is compelled by competition to do so. Where the through rate is the same from points on the connecting line as it is from the junction, the share or division of the connecting carrier consists wholly of this absorption. Where the through rate from points on the connection is higher than the junction-point rate, the connecting line receives as its share an additional amount consisting of the difference between these rates. This additional amount is called the arbitrary or differential. Thus, the Fernwood & Gulf receives a division of 4 cents per 100 pounds, consisting of a 2-cent absorption and a 2-cent arbitrary.[5]

The Illinois Central argues that the discrimination in charging a higher rate from Knoxo cannot be deemed unjust since the preferential rate to other points was granted solely for the purpose of increasing its own business, and that the lower rate from Knoxo was denied solely in order to preserve its own revenues. In other words, it granted the blanket rate to all points on its own lines in order to develop business originating thereon. It declined to grant the blanket rate (and to increase the absorption) where the connecting line was wholly dependent upon it; and traffic originating thereon could be secured in spite of the higher rate. It granted the blanket rate to points on connecting lines (and increased their absorptions) where this was deemed necessary in order to secure traffic which might otherwise go to competitors.

---

[4]See The Tap Line Cases, 234 U. S. 1; Louisiana & Pine Bluff Ry. Co. *v.* United States, 257 U. S. 114.

[5]As a division of only 2 cents is ordinarily deemed inadequate compensation by a connecting line, and as the trunk line is naturally indisposed to submit to a larger shrinkage of its own division, the through rate is commonly increased by an arbitrary, if the traffic will bear it.

The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *Chicago Great Western Ry.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. It is true that the law does not attempt to equalize opportunities among localities, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445. To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions. But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

Every factor urged by the carriers as justifiying the higher rate from Knoxo appears to have been considered by the Commission. How much weight shall be given to each must necessarily be left to it. The Commission found, among other things, that the cost of the service from Knoxo was not greater than the cost of the transportation from many other points which enjoyed the lower rate; that the value of the service was the same; and that other traffic conditions incident to shipment from Knoxo were so similar to those of shipments from other points enjoying a lower rate that the prejudice to which the Swift Lumber Company had been subjected was undue and unreasonable. The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a find-

ing that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate-making.[6] See *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 554. It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo to undue prejudice. The judgment so exercised, being supported by ample evidence, is conclusive.[7]

Third. The Fernwood & Gulf contends that the order is obnoxious to the due process clause. The argument is that even its present division of 4 cents per 100 pounds is unremunerative; and that a smaller return would be confiscatory. To this argument

[6]Compare Idaho *v.* Director General, 66 I. C. C. 330, with Idaho *v.* Oregon Short Line, 83 I. C. C. 4.

[7]Interstate Commerce Commission *v.* Illinois Central R. R. Co., 215 U. S. 452, 470; Interstate Commerce Commission *v.* Delaware, Lackawanna & Western Ry. Co., 220 U. S. 235, 251; United States *v.* Louisville & Nashville R. R. Co., 235 U. S. 314, 320; Manufacturers Ry. Co. *v.* United States, 246 U. S. 457, 481; Seaboard Air Line Ry. Co. *v.* United States, 254 U. S. 57, 62.

In East Tennessee, Virginia & Georgia Ry. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 11, 12, 23-26, and Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 190 U. S. 273, the orders of the Commission were only *prima facie* evidence of facts found by them, since they were entered before the Acts of June 29, 1906, c. 3591, 34 Stat. 584, 589, 591, and the Act of June 18, 1910, c. 309, 36 Stat. 539, 551-554. See Proctor & Gamble Co. *v.* United States, 225 U. S. 282, 297-8; Kentucky & Indiana Bridge Co. *v.* Louisville & Nashville R. R. Co., 37 Fed. 567, 613. Moreover, those cases involved primarily a question arising under the Fourth Section.

there are several answers. The order does not require a reduction of the through rate. It may be complied with by raising the rate from Fernwood and other points now being preferred. Moreover, a reduction of the through rate would not necessarily result in decreasing the amount of the short line's division. The Commission may, upon application, accord to the Fernwood & Gulf the appropriate division.[8] *The New England Divisions Case,* 261 U. S. 184. There is no suggestion that the resulting reduction of the Illinois Central's division would result in rendering the rate confiscatory as to it.

Fourth. The Fernwood & Gulf contends, also, that the Swift Lumber Company is estopped from questioning the rates applicable to it. The argument is that when it acquired the mill property from a predecessor of the short line, an agreement provided that all lumber produced should be shipped over the line; and that the 2-cent arbitrary was then known to be in effect, and was thereby assented to for all time. The contract, which is silent as to rates, is not susceptible of the construction urged. We have, therefore, no occasion to consider whether such an agreement would be valid and what its effect would be. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433; *United States* v. *Union Stock Yard,* 226 U. S. 286; *O'Keefe* v. *United States,* 240 U. S. 294.

In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, express or implied.[9] Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

In No. 40, decree reversed.
In No. 38, decree affirmed.

---

[8]This was done, after removing the unjust discrimination, in McGowan-Foshee Lumber Co. *v.* Florida, Alabama & Gulf R. R. Co., 43 I. C. C. 581; 51 I. C. C. 317.

[9]See St. Louis Southwestern Ry. Co. *v.* United States, 245 U. S. 136, 139, note 2.